IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79 - 1625

SIERRA CLUB, et al.,

Petitioners,

vs.

CECIL D. ANDRUS, as Secretary of the Interior of the United States, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 31, 1979, insofar as it held (1) that operation of the Tracy Pumping Plant of the Central Valley

Project of the United States Bureau of Reclamation had been "affirmatively authorized by Congress" within the meaning of Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403), and (2) that this facility was therefore exempt from the requirement of that section that any alteration or modification of a navigable waterway be approved by the Secretary of the Army and the Chief of Engineers of the Army Corps of Engineers.

Petitioners are the Sierra Club, a nationwide conservation organization, and Hank Schramm and William Dixon, two individuals whose substantial interest in this controversy is described in the opinions of the courts below (Appendix, pages 5-6, notes 1-3, pages 67-68). Respondents are the federal officials responsible for the operation and oversight of the Tracy Pumping Plant, namely, the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, the Secretary of the Army, the Chief of Engineers of the Army Corps of Engineers and the Division and District Engineers of the Corps of Engineers.

Two additional petitions for writs of certiorari to review other aspects of the same judgment of the court of appeals have

previously been filed by other parties to the proceedings below. These are presently pending in this Court as Docket Nos. 79-1252 and 79-1502.

Opinions Below

The decision of the court of appeals is officially reported at 610 F.2d 581 and is reproduced in the Appendix (Appendix pages 5-62). The decision of the District Court is officially reported at 400 F.Supp. 610 and is also reproduced in the Appendix (Appendix pages 63-129).

Jurisdiction

The judgment of the court of appeals was entered on October 31, 1979. A timely petition for rehearing en banc was denied on January 17, 1980. This petition is being filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the legislative history relied upon by the court below in fact establishes that Congress has "affirmatively authorized" an "obstruction . . . to [the] navigable capacity" of the Sacramento-San Joaquin River Delta arising from the operation of the Tracy Pumping Plant and has thus

exempted that facility from compliance with the requirements of Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403).

Statutes Involved

The principal statute involved is section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403). It is reprinted, together with certain related sections of the Act, in the Appendix.

Statement of the Case

I. The Nature of the Case and the Proceedings Below

This case involves an attempt by the Bureau of Reclamation and the California Department of Water Resources to implement what are probably the most extensive diversions of water in this nation's history without effecting even colorable compliance with the 80-year old Congressional mandate that all modifications of the condition or capacity of any navigable waterway be reviewed and approved by the United States Army Corps of Engineers. According to the trial court's unchallenged findings, the diversion projects at issue in this case would ultimately accomplish a reduction of up to 80 per cent in the flow of one of the major rivers of the West and have already

effected a subsidence, by at least 18 inches, of the water level in numerous portions of the vast delta region by which several such major rivers empty into the San Francisco Bay and the Pacific Ocean (Appendix, pages 89-92). The entire system, nevertheless, has been constructed and is being operated in total disregard of the specific and express procedures for administrative review and oversight of such projects long since established by Congress for the purpose of preventing disruption and obstruction of the nation's system of navigable waterways (Appendix, pages 50-53, 93-104).

Public disclosure of this massive bureaucratic lapse is what prompted the present litigation. By their complaint, petitioners sought an adjudication that three principal components of the defendants' diversion projects - namely, the state-operated Delta Pumping Plant, the Tracy Pumping Plant of the Bureau of Reclamation and the more recently commenced project for construction of the Peripheral Canal - are in violation of the applicable law, and requested appropriate relief against continuation of the defendants' unauthorized activities. Following the first phase of a bifurcated trial, the district court entered an interlocutory judgment to the

effect that these elements of defendants' projects were indeed unlawful and enjoined the defendants from continuing to ignore their legal duty to apply for approval by the Corps of Engineers of the construction and operation of these facilities (Appendix, pages 104, 127-29).

Although the defendants acquiesced in the trial court's judgment regarding the Peripheral Canal (Appendix, page 8), they sought review by the court of appeals of the finding of illegality with respect to both the Delta Pumping Plant and the Tracy Pumping Plant. That court affirmed the judgment of the district court regarding the state's Delta Pumping Plant but reversed the trial court with respect to the federal Tracy Pumping Plant. Rejecting the express finding of the trial court on this issue (Appendix pages 101-3), the court of appeals held that any obstruction to navigation resulting from operation of the latter facility had been "affirmatively authorized by Congress," within the meaning of the Act, in the course of Congress's consideration and funding of various phases of the federal role in the overall diversion project (Appendix, pages 40-49). This latter ruling of the court of appeals is the subject of this petition.

II. Summary of the Evidence Relied upon by the Court of Appeals to Support Its Judgment That Any Obstruction to Navigation Arising from Operation of the Tracy Pumping Plant Has Been "Affirmatively Authorized by Congress" and Is Therefore Exempt from the Provisions of Section 10

The statutory provision applied by the courts below in determining whether the Tracy Pumping Plant had been exempted by Congress from the permit procedures of the Corps of Engineers was the first clause of section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403). That section provides in its entirety as follows:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within

> the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The principal purpose and effect of this statute, according to the construction originally adopted by this Court in Wisconsin v. Illinois, 278 U.S. 367 (1928), and accepted by both of the courts below, is to delegate to the Army Corps of Engineers the primary power to regulate and to approve or prohibit, by appropriate administrative procedures, any activity affecting the course, condition or capacity of a navigable waterway. Wisconsin v. Illinois, supra at 413. See also Republic Steel Co. v. United States, 362 U.S. 482, 486-87 (1960). Unlike section 9 of the same Act, which is solely applicable to the construction of dams and dikes, section 10 does not require that Congress itself approve each activity or project, but instead generally confers this authority on the Secretary and the Corps wherever they are able to make a finding that the work in question will not create an unreasonable obstruction to navigation. Id. (see, generally, Appendix, pages 25-33, 84-88). The first

clause of the statute, however, creates a special exception to this general delegation of authority by confining the application of the entire section to activities "not affirmatively authorized by Congress." The effect of this exception is to reserve to Congress the power to exempt a particular work from the ordinary administrative permit procedures by "affirmatively authoriz[ing]" any obstructive impact which it might otherwise be found to have upon the navigable waterways. See Wisconsin v. Illinois, supra at 412-13, 416-18. Sanitary District of Chicago v. United States, 266 U.S. 405, 427-28 (1924); Hubbard v. Fort, 188 Fed. 987, 986 (D.N.J. 1911) (see also Appendix, pages 40-49, 101-3).

Rightly discerning that a lax construction of this exemption could result in a blanket immunity from the statutory requirements for all federal agencies and projects, the Corps of Engineers has traditionally given a strict interpretation to the exemption for works "affirmatively authorized by Congress." Its current regulations provide (33 CFR §322.3(c)(1)):

> The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purpose

> of Section 10. If an agency asserts that it has Congressional authorization meeting the test of Section 10 or would otherwise be exempt from the provisions of Section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of Section 10.

The court of appeals expressly approved and adopted this administrative interpretation of the statute (Appendix, pages 43-44). The court thus agreed with the district court and with petitioners that the exemption provided by the first clause of section 10 should be held inapplicable to the Tracy Pumping Plant unless it could be shown that "the various congressional statutes and legislative history concerning the Central Valley Project are so sufficiently specific as to the Tracy Pumping Plant as to constitute congressional authorization under section 10" (Appendix, page 44). The court nevertheless went on to hold, on the basis of its review of this legislative history, that any obstruction to the navigable capacity of the channels of the Delta resulting from the diversions effected by the Tracy Pumping plant had

indeed been "affirmatively authorized by Congress" (Id., pages 44-49).

The evidence purportedly establishing Congress's consideration and approval of the navigational effect of the Tracy Pumping Plant which was relied upon by the court of appeals is described at length in the court's opinion and need not be repeated here in all its detail (See Appendix, pages 44-49). It will be useful, however, to undertake a general summary of the different types of evidence of congressional consideration cited by the court, with specific attention to the presence or absence of any reference to the Tracy Pumping Plant occurring in any of the cited materials. In brief, the major categories of legislative materials invoked by the court to support its finding on this issue were the following:

1. Legislation authorizing the Central Valley Project as a whole or reclamation projects in general. This first category of legislative materials cited by the court of appeals includes three basic items. The first of these is the initial congressional authorization of the commencement of the Central Valley Project, in which a general reference to "the delivery of the stored waters" of the Sacramento

and San Joaquin Rivers is the closest thing to be found to a specific congressional approval of any navigational obstruction, and which neither contains nor refers to any of the particular features of that massive project, let alone the Tracy Pumping Plant and its possible effects on navigation in the Delta. 50 Stat. 844, 850 (1937); 49 Stat. 115 (1935) (Appendix, pages 44-45). The second item in this category is the Reclamation Project Act of 1939, which merely confers general authority on the Secretary of Interior to undertake reclamation projects which he finds to be financially feasible, and which contains no reference whatsoever even to the Central Valley Project, much less to the potential effects of the contemplated pumping operations in the Delta. 53 Stat. 1187 (1939), now codified as 43 U.S.C. §485(h) (Appendix, page 45). Finally, the court of appeals relied upon the enactment, seven years after the completion and initial operation of the Tracy Pumping Plant, of legislation authorizing construction of a wholly separate phase of the Central Valley Project, in which the Tracy Pumping Plant receives its only mention in any of these acts of Congress. The reference to the plant in that statute, which the court of appeals

hyperbolically described as evidencing congressional approval of "the precise location and plans of the Tracy Pumping Plant" (Appendix, page 48), consists in its entirety of the following single sentence in the four-page-long enactment (74 Stat. 156, 159 (1960); emphasis added):

> If the Secretary proceeds to construct, operate, and maintain the San Luis Works under the terms of section 1 of this Act solely as a Federal project, the operation shall be subject to the following restriction: Whenever the chlorides in the water at the head of the Delta-Mendota Canal exceed one hundred and fifty parts per million during the months of July, August, or September, the mean daily diversion from the Sacramento-San Joaquin Delta to the San Luis unit via Tracy pumping plant and Delta-Mendota Canal as measured at the San Luis pumping plant shall not exceed the mean daily import to the Sacramento Valley from the Trinity project.

2. Appropriation Acts. In addition to these general authorization acts, the court cites numerous enactments appropriating funds for reclamation which were apparently used by the Secretary of the Interior to construct the Tracy Pumping Plant and to implement the massive diversion of Delta water made possible by use of that facility (Appendix, page 43-47). As the court concedes in its opinion, however,

only one of these statutes, enacted a year after the commencement of construction of the Tracy Pumping Plant, contains any reference to that particular facility or to any aspect of its construction or operation (Appendix, page 46). That reference consists of the inclusion of a single item, denominated "switch yards, Shasta, Keswick and Tracy Pumping Plants, $3,250,000," in a long list of appropriations. "[f]or continuation of construction" of various reclamation projects, which list is itself contained in a statute some 38 pages in length. 62 Stat. 1112, 1129 (1948). Needless to say, none of these appropriation acts reflects any sign that Congress ever considered or approved the navigational effects of the use of these appropriated funds to effect diversions of water through the Tracy Pumping Plant.

3. Committee Reports and Testimony. The court of appeals also relied upon a handful of committee reports containing various parenthetical references, none more than a few words in length, to the existence of a pumping plant at Tracy (Appendix, page 47, note 34). The most extensive of these references appears in a statement of the Commissioner of Recla-

mation inviting the members of a Senate committee to attend the opening of Shasta Dam, wherein he states that, when the dam is opened, "water will be released from Shasta Dam, carried down the Sacramento River through Shasta and Keswick generators, through the cross-channel-canal cut, lifted up 200 feet by the great Tracy Pumps, and sloshed down the long Delta-Mendota Canal to the Mendota pool. . . ." (Appendix, pages 47-48, note 34). The remainder of the references to the Tracy Pumping Plant in these materials are even less descriptive. In addition to these reports mentioning the pumping plant, the court also referred to a Finding of Feasibility for the Central Valley Project which was submitted to the House of Representatives by the Secretary of the Interior, pursuant to the requirements of the 1939 Reclamation Act, on February 24, 1947, a few days after commencement of construction of the Tracy Pumping Plant. H. R. Doc. No. 146, 80th Cong., 1st Sess. (1947). The most remarkable feature, for present purposes, of this detailed 48-page study of nearly all phases of the Central Valley Project is that it does not contain a single mention of the Tracy Pumping Plant or of its enormous potential impact, later realized, on water levels and other con-

ditions of navigability in the Delta.

This, then, is the entire record on the basis of which the court of appeals concluded that Congress had "affirmatively authorized," within the meaning of the statute, any "obstruction . . . to navigable capacity" that might arise from diversion of water through the Tracy Pumping Plant, and that it had additionally "approved the exact location and plans" of that plant within the meaning of the regulations of the Corps of Engineers implementing the statute.

Reasons for Granting the Writ

I. The Court of Appeals' Decision Represents a Clearly Erroneous Application of the Plain Terms of the Statute and, Unless Reversed by This Court, Will Permit Wholesale Evasion by Federal Agencies of the Mandatory Permit Procedures of the Rivers and Harbors Act of 1899

Even if the matter is considered without reference to the prior conflicting decisions of this Court and the other lower federal courts which are discussed in Part II below, it is apparent that the conclusion drawn by the court of appeals from the foregoing meager record of congressional consideration of the Tracy Pumping Plant represents an

erroneous application of the statute. The most that is shown by this record is that Congress was made generally aware, at one time or another, that an edifice known as the Tracy Pumping Plant was being utilized to transport some undetermined quantity of water from some undetermined location in the Sacramento-San Joaquin River Delta. There is not a single item in this entire legislative history indicating that Congress was ever informed that the operation of the plant would have any effect at all on the navigable capacity of the Delta channels, let alone that it would substantially lower water levels in that area and might later play a significant role in the diversion of up to 80 per cent of the water of a major river (see Appendix, pages 89-92). Similarly, there are no indications in the record that Congress was ever apprised that construction and operation of this facility would be carried out by the Bureau of Reclamation without any attempt at compliance with the permit requirements which are imposed on federal agencies, as on all other public and private entities, by the provisions of

the Rivers and Harbors Act of 1899.* Nor, finally, is there any suggestion in this history that Congress ever intended to create, or was asked to create, any special exemption of the Tracy Pumping Plant from the mandatory terms of those statutory provisions. When this legislative history is matched against the actual language of the statute, it is clear that Congress cannot be said, by any stretch of the imagination, to have "affirmatively authorized" the Bureau of Reclamation to excuse itself from the requirements of the Act, or to create any "obstruction . . . to the navigable capacity" of the Delta without first securing the necessary permit from the Army Corps of Engineers. Any other conclusion would require either a disregard of the plain words of the statute or

* It is perhaps noteworthy in this regard that this Court's decision in United States v. Arizona, 295 U.S. 174 (1935), which unambiguously reaffirmed the applicability of the Rivers and Harbors Act of 1899 to the activities of federal agencies in general and of the Bureau of Reclamation in particular was handed down at approximately the same time that Congress was considering the original authorization of the Central Valley Project.

an acceptance of the notion that a mere passive awareness by Congress of a proposed pumping facility somehow implies congressional knowledge and approval of both its potential adverse effects on navigation and the unexpressed intention of the responsible agency personnel to construct and operate the facility in disregard of pertinent legal requirements. Since neither of these premises is tenable, it follows that there is no rational basis in the record for the court of appeals' decision on this issue.

Failure by this Court to correct this mistaken ruling of the court below would not merely perpetuate a legal error, but might well have the practical effect of entirely frustrating the application of the statute to any of the agencies of the federal government. As noted above, it has heretofore been regarded as well settled, and is apparently conceded by all parties to this proceeding, that the permit requirements of section 10 of the Act were intended by Congress to apply with their full force to activities of the federal government. United States v. Arizona, supra at 184. See 33 C.F.R. §322.3(c)(1). If, however, the kind of minimal evidence relied upon by the court below to establish a special exemption for

the Tracy Pumping Plant were deemed generally sufficient to exempt any federal project from these statutory requirements, little scope would remain for their application. For it would undoubtedly be a rare case in which any of the federal agencies - all of which must, after all, obtain their general authority and operating funds through acts of Congress - would be unable to piece together from the legislative history of their enabling acts the sort of cryptic and isolated references to a challenged project which the court of appeals has held sufficient to confer a statutory immunity on the project at issue in this case. The decision of the court of appeals thus represents, not simply a solitary misjudgment in the application of the statute to the facts of a particular case, but a general invitation to wholesale disregard of the statutory command by all of the agencies of the federal government. The gravity of this consideration alone, quite independently of the conflict with other relevant decisions which is discussed in the succeeding section, demands that this Court take action to reverse that decision. See Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 299 (1946).

II. The Decision of the Court of Appeals Is in Direct Conflict with the Decisions of this Court and the Other Decisions of the Lower Federal Courts Interpreting the Relevant Provisions of the Statute, and, in Addition, Is in Conflict with the Numerous Decisions of This Court and the Lower Federal Courts Establishing the General Rule That Exemptions from the Mandatory Provisions of Pre-Existing Federal Statutes Are Not Normally to Be Implied from Subsequent General Enabling Legislation or Appropriations Acts

A. Decisions Under the Rivers and Harbors Act of 1899

The only prior decisions of this Court construing the exemption conferred by the first clause of Section 10 of the Rivers and Harbors Act of 1899 are the two decisions in the so-called Chicago Drainage Canal Cases, Sanitary District of Chicago v. United States, 266 U.S. 405 (1924), and Wisconsin v. Illinois, 278 U.S. 367 (1928). Those cases involved the construction and operation by the State of Illinois and the Chicago Sanitary District, without proper authorization from the Army Corps of Engineers, of a drainage Canal through which the waters of Lake Michigan were being diverted for the purpose of disposing of Chicago's sewage. In the first of the

cases, the defendants contended, by way of defense to the injunctive action brought by the federal government under the Rivers and Harbors Act, that Congress had "given its assent to all that has been done," and cited as the principal support for that contention an earlier congressional enactment granting land to the state for the specific purpose of contructing the drainage canal. In its opinion affirming the lower court's grant of injunctive relief, this Court disposed of this particular defense in the following passage (266 U.S. at 428):

> [The act of Congress] certainly vested no irrevocable discretion in the state with regard to the amount of water to be withdrawn from the lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by, as immaterial, all evidence of its having fostered the work. Even if it had approved the very size and shape of the channel by act of Congress, it would not have compromised its right to control the amount of water to be drawn from Lake Michigan.

The court went on to hold that the diversions in question were unlawful in the absence of a permit from the Corps of Engineers issued pursuant to section 10. 266 U.S. at 432.

In the second of these cases, which arose from a subsequent action brought by the State of Wisconsin to enjoin another phase of the same diversion, the Sanitary District raised the same defense, this time relying, not only upon the congressional grant of land to the state, but also on a subsequent congressional appropriation of funds for the specific purpose of dredging the Chicago River at its confluence with the drainage canal. Again, the Court rejected the proferred defense, expressly adopting and incorporating in its opinion the conclusion of the special master that "Congress has not . . . authorize[d] the diversion in question." 278 U.S. at 417.

If anything, the specific congressional enactments respecting the diversion project at issue in these two cases represent far stronger evidence of a congressional intention to exempt these facilities from the permit requirements of the Act than any of the sorts of general agency authorizations and one-line references in lengthy appropriation acts which the court of appeals relied upon to sustain the claim of exemption in this case. It follows that the court of appeals' holding in this regard is in direct conflict with the only extant

decisions of this Court construing this provision of the statute.

Cognizant of this apparent direct conflict, the court below sought to explain it away on two grounds. First, the court ventured its view that the Chicago Drainage Canal Cases merely involved "[t]he right of the Congress to control the operation of a facility that it has previously approved," and that these decisions therefore simply stood for the proposition that Congress may constitutionally revoke its own prior authorization of a challenged project (Appendix, pages 40-42, note 29). This, however, is simply a misapprehension of the facts of these cases. Congress had taken no action in either case to revoke anything it had previously done with regard to the Chicago Drainage Canal or to assert any control whatsoever over the canal's operation. Rather, the sole basis of both actions, as it is of this action, was the straightforward claim that the defendants had failed to comply with the pre-existing requirements of section 10 of the Rivers and Harbors Act of 1899. 278 U.S. at 400, 420; 266 U.S. at 423-24. As in this case, the issue of congressional authorization was raised solely as a defense to that

claim, and this Court's resolution of that issue against the defendants in those cases occurred solely in that context. These cases are thus identical to this one in this respect, and the purported distinction essayed by the court of appeals is accordingly without substance.

The second ground for the refusal of the court below to follow these dispositive decisions was its apparent belief that a dictum in this Court's subsequent opinion in United States v. Arizona, supra, had modified the principle enunciated in these earlier cases (Appendix, pages 41-43). That dictum consisted of the following single sentence, uttered in reference to a certain dam on the Colorado River, the legality of which, incidentally, was not at issue in that case (295 U.S. at 186):

> Congress has made appropriations for the benefit of the project of which it is a part and so recognized and approved the building of the dam.

The court of appeals interpreted this statement as the announcement of a new rule to the effect that any congressional appropriation for an entire reclamation project may be deemed to constitute legislative authorization and consequent exemption from the permit provisions of section 10

of the Rivers and Harbors Act for each and every element of that project (Appendix, pages 43, 46).

Such an interpretation of this dictum is untenable. In the first place, neither the dictum itself nor any other portion of the opinion in United States v. Arizona, supra, actually involved an application of the terms of section 10. The opinion in that case was instead concerned solely with the question of whether the defendants had obtained the "consent of Congress" to the construction of a dam which is required by section 9 of the Act. 295 U.S. at 184, 186. Since the term "consent" used in section 9 implies far less deliberate and extensive congressional consideration of a proposed project than the term "affirmatively authorized" which is utilized in section 10, any permissive interpretation of the former term which the Court might have given in that case would be of doubtful relevance to the application of the latter section in any event. At the very least, the Court's pronouncements on that very different subject could hardly be viewed as having overruled the authoritative construction of section 10 which had previously been enunciated in the Chicago Drainage Canal Cases.

Moreover, even apart from this factor, it is quite clear from the context of the Court's dictum in United States v. Arizona, supra, that the Court's statement was in no way intended to be viewed as a deliberate proclamation of the scope of either of these sections of the Rivers and Harbors Act. The dictum occurs in the course of the Court's rejection of an argument by the government that the "consent of Congress" to the construction of the Parker Dam had been conferred by an act granting the Secretary of the Interior general authority "to divert the waters of the Colarado River." The government pointed out, in support of its interpretation of this authorizing legislation, that the Secretary had already constructed a similar dam, the Laguna Dam, under the authority allegedly conferred by that same statute. The government's contention on this point was refuted by the Court in the following passage, which contains the dictum in question (295 U.S. at 185-86):

> In support of the construction for which it contends, plaintiff asserts that it was under this Act that the Secretary of the Interior built the Laguna Dam across the Colorado. But it does not appear that either riparian State objected or that the validity

> of his authority has ever been drawn in question. Congress has made appropriations for the benefit of the project of which it is a part and so recognized and approved the building of the dam. Wisconsin v. Duluth, 96 U.S. 379, 386, 24 L. ed. 668, 671. There has been cited no other instance of the construction, without the consent of the Congress, of a dam across a navigable interstate river. Indeed, it is not certain that that part of the Colorado was then deemed to be navigable. We find no merit in the contention that §25 of the Act of April 21, 1904, is the "consent of Congress" required by §9 of the Act of March 3, 1899.

The dictum to which the court below attached such great weight thus appears, when quoted in context, to have been nothing more than one of several speculative observations offered by the Court to explain how a different dam project, not then before the Court, might have received legal authorization. It is virtually inconceivable that, in these circumstances, the Court would have intended its remarks to abrogate its prior considered holdings on the effect to be given to general appropriation acts under the provisions of either section 9 or section 10 of the Rivers and Harbors Act. The court of appeals was clearly wrong in attaching such momentous significance to the Court's statement.

The reliance of the court below on the dictum in United States v. Arizona, supra, is thus clearly inappropriate on two independent grounds. First, the Court's remarks in that case were concerned with the different and more permissive provisions of a separate section of the Rivers and Harbors Act which is not involved in this case. Second, in any event, the Court's remarks, when viewed in context, cannot fairly be construed as a considered pronouncement of the governing law under either section of the Act. It follows that the Court's earlier decisions in the Chicago Drainage Canal Cases, with which the holding of the court below directly conflicts, have fully retained their authoritative status.

The decision below is also in conflict with the only two other decisions of the lower federal courts which are directly pertinent to the issue presented here. Those decisions, one of which, ironically, was rendered by another panel of the court below, are Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979), and Atchison, Topeka & Santa Fe R.R. Co. v. Callaway, 382 F.Supp. 610 (D.D.C. 1974), vacated as moot

431 F.Supp. 722 (D.D.C. 1977).* While both of these cases actually arose under section 9 rather than section 10, they present, by their logical implications, an even more forceful conflict with the decision below than would be presented by contrary holdings under section 10 itself. Each of these decisions held that not even the "consent of Congress" required by section 9, let alone the more restrictive "affirmative . . . authoriz[ation]" prescribed by section 10, could be implied from a legislative history far more indicative of conscious congressional approval of the challenged agency action than anything that appears in the record in this case. A recitation of the details of congressional action depicted in the opinions in both

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* The author of the opinion below admits to having learned of the decision in Libby only "after the first draft of a proposed Opinion in the present appeal was circulated" to the other members of the panel (Appendix, page 49 n.36). The task of attempting to reconcile the two conflicting decisions was delegated to Judge Tang, who was a member of both panels (Id.). Petitioners will not burden the court with a recitation of all of the reasons why the efforts of Judge Tang to accomplish this considerable task in his concurring opinion (Appendix, pages 55-62) ultimately proved unsuccessful.

of these cases would unduly lengthen this petition. Suffice it to say that each case involved, among other things, a congressional enactment which narrowly, specifically and expressly appropriated funds for the full cost of the precise structure that the court ultimately found to be in violation of section 9 of the Act. 594 F.2d at 745; 382 F.Supp. at 619-20. Since this is far more than the court of appeals was able to adduce in this case by way of purported satisfaction of the even stricter standards of section 10, these decisions are plainly inconsistent with the decision below. This fact of course reinforces the need for this Court to review that decision on the merits.

B. Decisions Applying the General Rule That Exemptions from the Requirements of Pre-Existing Law May Not Normally Be Implied from Subsequent General Enabling Legislation and Appropriation Acts

In holding that the congressional enactments authorizing and appropriating funds for various phases of the Central Valley Project had effectively exempted the Tracy Pumping Plant from the mandatory permit procedures of section 10, the court below

also departed from the settled general rule that exemptions from pre-existing statutory requirements may not be implied from subsequent general enabling or appropriation acts in the absence of a clear expression of congressional intent to abrogate those requirements. Little purpose would be served by a detailed exposition of the literally dozens of decisions to this general effect rendered by this Court and the lower federal courts. E.g., Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Greene v. McElroy, 360 U.S. 474 (1959); Ex Parte Endo, 323 U.S. 283 (1944); United States v. Arizona, supra; Libby Rod & Gun Club v. Poteat, supra; City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir. 1978); Arizona Power Pooling Assn. v. Morton, 527 F.2d 721 (9th Cir. 1975); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); D.C. Federation of Civic Associations, Inc. v. Aris, 391 F.2d 478 (D.C. Cir. 1968); National Audubon Society v. Andrus, 442 F.Supp. 42 (D.D.C. 1977); Atchison, Topeka & Santa Fe R.R. Co. v. Callaway, supra. Only two representative examples will therefore be discussed.

The first of these examples is this Court's recent decision in Tennessee Valley Authority v. Hill, supra. In that case, the government argued that agency actions otherwise violative of the pre-existing provisions of the Endangered Species Act (16 U.S.C. §1531 et seq.) had been effectively exempted from the application of the Act by subsequent appropriations of funds to support the contested actions. The government was able to buttress its argument by citation of an extensive legislative history demonstrating Congress's full awareness of the agency's contemplated departure from the provisions of the earlier Act, including no less than three formal committee reports expressing the opinion that the agency action should not be deemed violative of the Act and specifically "recommend[ing]" and "direct[ing]" that it be carried out. 437 U.S. at 167, 170-71. This Court nevertheless held the agency's activities to be unlawful, rejecting the government's argument on this issue in the following passage (437 U.S. at 189-91):

> Notwithstanding Congress' expression of intent in 1973, we are urged to find that the continuing appropriations for Tellico Dam constitute an implied repeal of the 1973 Act, at least insofar as it applies to the Tellico Project. In support of this view, TVA points to the statements found in various House and Senate Appropriations Committees' Reports; . . .

There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act. . . . To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the "cardinal rule . . . that repeals by implication are not favored." Morton v. Mancari, 417 U.S. 535, 549 (1974), quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936). In Posadas this Court held, in no uncertain terms, that "the intention of the legislature to repeal must be clear and manifest." Ibid. . . .

The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an appropriations measure." Committee for Nuclear Responsibility v. Seaborg, 149 U.S. App. D.C. 380, 382, 463 F.2d 783, 785 (1971) (emphasis added); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 355 (CA8 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, re-

> pealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.

As for the lower federal courts, an example of their holdings on this same issue in the types of cases most closely analogous to this one is the decision of the Court of Appeals for the District of Columbia Circuit in D.C. Federation of Civic Associations, Inc. v. Aris, supra, where the defendant highway officials argued that a freeway project had been exempted from compliance with the public hearing procedures of 7 D.C. Code §§108-15 by Congress's appropriation of funds for the project. In the course of rejecting this argument, the court said (391 F.2d at 481-82):

> [I]t cannot be said that the appropriation acts ratified the administrative action contrary to Title 7. Obviously, Congress cannot intend to ratify illegal action of which it is unaware. Therefore, where the ratification by appropriation argument has been accepted, courts have been careful to demonstrate factors attesting to Congress' specific knowledge of the disputed administrative action [citing cases].

> In this case there is no evidence to suggest that the appropriations committee or Congress as a whole were aware of the intention of District Officials to plan and construct the freeway projects in disregard of basic Title 7 procedures. General knowledge that the freeway projects were being planned or that there was a general intention to advance the freeway system as a whole is insufficient to support the ratification by appropriation argument.

No elaboration is necessary upon these eloquent statements of the scope and rationale of the settled rule that implied exemptions from existing laws may not be inferred from subsequent enactments unless Congress's intention to confer such an exemption is "clear and manifest." TVA v. Hill, supra at 189. Nor is any extended discussion necessary in order to demonstrate that the holding of the court below on the record adduced in this case violates this settled rule. As described above, this record shows that, while Congress may have been marginally aware of the existence of the Tracy Pumping plant, it gave no consideration at all to its potential effects on navigation, received no intimation whatsoever that the existing statute on that subject would not be complied with by the Bureau of Reclamation, and never entertained even the possi-

bility, let alone the "clear and manifest" intention, of authorizing an exemption from that statute. It follows that, in holding otherwise, the court of appeals brought itself into clear conflict with all of the decisions cited above enunciating the general doctrine on this issue.

III. Conclusion

It has been demonstrated that the decision of the court below is a plainly erroneous application of the relevant provisions of the governing statute and is in direct conflict with the prior decisions under that statute of this Court and the lower federal courts, as well as the numerous decisions establishing the general standards for resolving claims of implied exemptions from federal statutes. Far from being an unimportant aberration, moreover, the court of appeals' decision, by finding such an implied exemption in the absence of any significant evidence of a conscious Congressional purpose to abrogate its prior enactments, raises the specter of wholesale

evasion by federal agencies of the provisions of the Rivers and Harbors Act, if not of the entire scheme of statutes regulating the activities of these agencies. For all of these reasons, the decision should be reviewed and corrected by this Court.

Dated: April 15, 1980.

Respectfully submitted,
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JOHN B. CLARK
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SIERRA CLUB LEGAL DEFENSE FUND
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APPENDIX 1.

Section 9, Rivers and Harbors Act of 1899:

"Construction of bridges, causeways, dams or dikes generally.

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army. *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army." 33 U.S.C. § 401.

Section 10, Rivers and Harbors Act of 1899:

"Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited;

and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to

Section 12, Rivers and Harbors Act of 1899:

Penalty for wrongful construction of bridges, piers, etc.; removal of structures.

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper porceedings to this end

may be instituted under the direction of the Attorney General of the United States. 33 U.S.C. § 406.

Section 17, Rivers and Harbors Act of 1899:

Duty of United States attorneys and other Federal officers in enforcement of provisions; arrest of offenders.

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And*

provided further, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto so authorized by law in case of crimes against the United States. 33 U.S.C. § 413.

APPENDIX 2.

[610 F2d 581]

SIERRA CLUB, a non-profit California Corporation, et al., Plaintiffs-Appellees, v. Cecil D. ANDRUS,* as Secretary of the Interior of the United States, et al., Defendants-Appellants, Kern County Water Agency, a public agency, et al., Intervenors-Appellants.

Nos. 76-1464, 76-1494, 76-1534, 76-1651, 76-1663 and 76-1981.

United States Court of Appeals, Ninth Circuit. Oct. 31, 1979. Rehearing Denied Jan. 17, 1980.

Walter E. Wunderlich, Deputy Atty. Gen., Dept. of Justice, Sacramento, Cal., for defendants-appellants.

Robert Thum, San Francisco, Cal., on brief; John Clark, San Francisco, Cal., for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of California.

Before ELY, TRASK, and TANG, Circuit Judges.

ELY, Circuit Judge:

These appeals stem from the efforts of two environment associations and two private citizens[1] to control the pumping of water from the Sacramento-San Joaquin Delta (the Delta) into the canals and aqueducts of the California Water Project. The facts are reported fully in the excellent opinion of

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*Mr. Andrus is the present Secretary of the Interior. He has been substituted as an appellant for one of his predecessors who was originally named as a party in his official capacity. Rule 43(c) Fed.R.App.P.

[1] The appellees, plaintiffs below, are the Sierra Club, a nonprofit California corporation having in excess of 130,000 members, of whom more than 40,000 are in the San Francisco Bay and Sacramento-San Joaquin Delta areas; Friends of the Earth, a nonprofit New York corporation that has its principal place of business in San Francisco; Hank Schramm, a commercial fisherman active in the San Francisco Bay and the Pacific Ocean; and William Dixon, a Sacramento-San Joaquin Delta landowner.

District Judge Renfrew. *Sierra Club v. Morton*, 400 F.Supp. 610 (N.D.Cal. 1975). After the first phase of a bifurcated trial the District Court ordered the federal[2] and state[3] defendants to obtain authorization for the operation of their pumping plants from the United States Army Corps of Engineers (the Corps), pursuant to section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1970). The court also ordered the Secretary of the Army to prepare an environmental impact statement prior to the issuance of such authorization. *Id.* at 651. In addition, the court enjoined construction on the proposed Peripheral Canal until an environmental impact statement was prepared and authorization from the Corps was obtained. The Peripheral Canal would transfer water directly from the Sacramento River to a point close to the pumping plants. Since the trial court

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[2]The named federal appellants, the defendants below, were federal officers who administer the various agencies responsible for overseeing the operation, construction, and regulation of the facilities in question. They were Rogers C.B. Morton, Secretary of the Interior; Gilbert Stamm, Commissioner of the Bureau of Reclamation; Howard H. Callaway, Secretary of the Army; William C. Gribble, Jr., Chief of Engineers of the South Pacific Division of the United States Army Corps of Engineers; Col. Frederick J. Rockwell, District Engineer of the Army Corps of Engineers for the Sacramento, California District; and Col. James L. Lammie, District Engineer of the Army Corps of Engineers for the San Francisco, California district. Because all of these individuals were sued in their official capacity, their successors are automatically substituted as some of the appealing parties. Fed.R.App.P. 43(c).

[3]The named state defendants in the District Court were Norman B. Livermore, Jr., Secretary for Resources; and John R. Teerink, Director of the Department of Water Resources. Like the federal parties, the named state appellants were sued in their official capacity, and their successors are automatically substituted as parties to the appeal in this court. Fed.R.App.P. 43(c).

The District Court also allowed the Kern County Water Agency, the Metropolitan Water District of Southern California, the Tulare Lake Basin Water Storage District, and the Santa Clara Valley Water District to intervene in these actions. The intervenors are public agencies of the State of California that have contracted for water from the California Water Project and have undertaken extensive financial obligations in reliance thereon.

has not yet conducted the relief phase of the bifurcated trial, it has not yet determined whether the appellees are entitled to further relief; accordingly, it has allowed the continuing operation of the pumping plants.

Here, the federal and state parties present five principal arguments. First, they contend that the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401–418 (1970) (the Act), does not create a private right of action, and that, therefore, only the United States can enforce the permit requirements of section 10.[4] Second, they contend that even if a private right of action exists, the appellees lacked standing to institute their suit. Third, it is asserted that section 10 does not apply to the pumping of water from the Sacramento-San Joaquin Delta; and fourth, if compliance with section 10 is required, such compliance already exists. Finally, the federal parties argue that since their plant, the Tracy Pumping Plant, was fully operational before the enactment of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (1970 & Supp. V 1975), no environmental impact statement

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[4]Section 10 of the Rivers and Harbors Act of 1899 provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403 (1970).

is necessary if a section 10 permit is required. Neither the federal nor the state parties challenge the District Court's ruling concerning the Peripheral Canal.

We have concluded that a private right of action should be implied on behalf of parties who seek to enforce compliance with the permit requirements of section 10 of the Act and that three of the four plaintiffs, having alleged particularized injuries, possess the requisite standing to avail themselves of that right. We agree with the District Court that the pumping of Delta water falls within the broad reach of section 10 and that the state parties have been exporting Delta water in violation of that provision. Unlike the District Court, however, we believe that Congress authorized the present operational level of the federal pumping plant, thereby excusing its operators from the section 10 permit requirement. Because of this second conclusion, we do not reach the final issue, i.e., whether the federal parties would be legally required to prepare an environmental impact statement before granting a section 10 permit for the federal pumping plant. We therefore affirm in part and reverse in part.

I. FACTS

The federal and state pumping plants are integral elements of the Central Valley and State Water Projects, which, together, constitute the California Water Project. The Central Valley Project, administered by the United States Bureau of Reclamation, consists of dams, reservoirs, pumping plants, canals, and other facilities designed to generate hydroelectric power, provide flood control, and supply water for irrigation and other uses in the Central Valley of California. To this end, water from the winter runoff is stored behind dams in the Sacramento River and then released, as needed, to flow down river and into the Sacramento-San

Joaquin Delta, where it merges with other Delta waters. The Tracy Pumping Plant, a principal component of the Central Valley Project, pumps water from the Delta into the Delta-Mendota Canal, a 115-mile canal leading to the Mendota pool in the Central Valley. The pumping capacity of the Tracy Pumping Plant is 4,602 cubic feet per second. In 1973 this plant pumped 2,127,341 acre-feet of water from the Delta.

The State Water Project, created by the Burns-Porter Act of 1959 and now codified in Cal. Water Code §§ 12930-12942 (West 1971), is the state analogue to the Central Valley Project. It also consists of dams, canals, pumping plants, and other facilities designed to generate power, provide flood control, and transfer water from the Delta to the more arid regions of central, coastal, and southern California. The state pumping plant, known as the Delta Pumping Plant, is central to the operation of this water project. Like the Tracy Pumping Plant, it withdraws water from the Delta, pumping it into a canal, where the water ultimately is permitted to flow to its place of use. The pumping capacity of the Delta Pumping Plant is now approximately 6,300 cubic feet per second. This capacity can be increased to approximately 10,300 cubic feet per second by the installation of additional pumping units, and it is contemplated that the first of these pumps will in fact be operational by 1980. In 1973 the Delta Pumping Plant withdrew 1,261,120 acre-feet of water from the Delta. The State of California, through its Department of Water Resources, has already entered into contracts providing that at some future time the State Water Project will annually deliver 4,230,000 acre-feet of water, of which 95 percent will be pumped by the Delta Pumping Plant. With the addition of the Peripheral Canal the potential withdrawal of Delta water by both the Tracy and Delta Pumping Plants will increase to approximately 7,000,000

acre-feet in 1990 and approximately 7,750,000 acre-feet by 2020.

The pumping, past and present, has had a significant impact upon the Delta. The District Court found

> that export pumping by these facilities both lowered Delta water levels and at certain times caused net flow reversals in Delta waterways. Although it is true that the exact magnitude of these effects was not precisely established, it is clear that they are far from any sort of *de minimus* exception. . . .

400 F.Supp. at 632.[5] Before we address whether this impact falls within the Corps' regulatory jurisdiction under section 10, it is obvious that we must first determine whether plain-

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[5]Because the Delta water flows in San Francisco Bay and is directly affected by the tidal cycle, water in the Delta channels and rivers tends to flow both up channel and down channel during the tidal cycle. For any given tidal cycle, however, there is a greater volume of flow in one direction. The amount of this excess is the net flow. A net flow reversal occurs when the net flow for a given tidal cycle is in a different direction from that of the normal direction.

The District Court considered several studies of the effect of the pumping on Delta water levels. A 1968 study, conducted by varying the pumping rates of the Tracy Plant and measuring the actual effect on water levels at various points, concluded that Delta water levels near the inlet channel of the plant were lowered .1 foot per 1000 cubic feet per second pumped. Effects of the pumping were detected as far away as the San Joaquin and Sacramento Rivers. Another study measuring the combined effect of the Tracy and Delta Plants concluded that diversion of between 9,600 cubic feet per second and 12,000 cubic feet per second during both high high and low high tides resulting in a lowered water level of 1.0 to 1.5 feet at one location near the pumping plants and almost .1 foot at a location on the San Joaquin River.

The District Court found that the above figures represented the minimum effect of the pumping plants on Delta water levels and that it was "highly probable if not certain" that an increase in the amount of pumping would result in greater effects. 400 F.Supp. at 631.

tiffs, as private individuals, can enforce the permit requirements of that section.[7]

II. PRIVATE RIGHT OF ACTION

To determine whether a statute contains an implied private remedy, a court should consider four separate questions. First, is the plaintiff a member of the "class for whose especial benefit the statute was enacted?" *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 39, 36 S.Ct. 482,

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[7] Prior case law has not definitively resolved the issue. Recently, our Circuit recognized an implied private right of action for damages caused by the negligent operation and maintenance of a bridge over navigable waters, alleged to constitute violations of both section 10 and a provision of the Bridge Act of 1906, 33 U.S.C. § 512 (1970). *Riggle v. California*, 577 F.2d 579 (9th Cir. 1978). Although *Riggle* did not involve either the permit requirement of section 10 or injunctive relief, that decision strongly supports our reading of the Act. See 577 F.2d at 582-83.

On the other hand, in general terms the Third Circuit has stated that Congress, in exercising its regulatory authority over navigation, did not "create any civil cause of action in favor of private parties injured by any violation of the Act." *Red Star Towing & Transp. Co. v. Department of Transportation of New Jersey* 423 F.2d 104, 105 (3d Cir. 1970). That case, however, presented a different issue, whether the 1899 Rivers and Harbors Act abrogated the eleventh amendment immunity of a state from suit in admiralty. According to the Third Circuit, Congress did not intend such a result. Id. at 106; cf. *Williamson Towing Co. v. Illinois*, 534 F.2d 758 (7th Cir. 1976) (regulation under Bridge Act of 1906, 33 U.S.C. §§ 491-498 (1970), does not abrogate state immunity from suit in admiralty); *Intracoastal Transp., Inc. v. Decatur County*, 482 F.2d 361 (5th Cir. 1973) (same). *But cf. Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen*, 404 F.2d 1001, 1003 (4th Cir. 1968) (state immunity abrogated by reason of regulation under the Rivers and Harbors Act of 1899).

Here, an eleventh amendment issue is not present because appellees sought only injunctive relief requiring the State to conform its conduct to the requirements of a federal statute. See *Edelman v. Jordan*, 415 U.S. 651, 664, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). To the extent that *Red Star Towing* may be construed as holding that no private right of action exists under section 10, we disagree. *Cf. Libby Rod and Gun Club v. Poteat*, 594 F.2d 742 (9th Cir. 1979) (*sub silentio* recognition of private cause of action under section 9 of the Act) *see discussion of Libby Rod and Gun Club* at note 36, *infra*).

484, 60 L.Ed. 874 (1916). Second, is there any indication of legislative intent, explicit or implicit, either to create or to deny a private right of action? Third, do the underlying purposes of the legislative scheme conflict with private enforcement of the act? Fourth, and last, "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975); *see Piper v. Chris-Craft Industries*, 430 U.S. 1, 37-41, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 457-458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974); *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 454 (9th Cir. 1977).

Although we have found no hard and precise indication of a congressional intent to create or deny a private remedy under section 10, we believe, without significant doubt, that such a remedy does exist. The plaintiffs below are members of a class for whose benefit Congress enacted the statute, and implication of a private remedy is both consistent with the purposes of the Act and complementary to its enforcement.

A. *Beneficiaries of the Rivers and Harbors Act*

The plaintiffs in this case who use the Delta and the San Francisco Bay also belong to the class for whose especial benefit the statute was enacted. Long ago, in 1888, the Supreme Court decided that federal common law did not prohibit obstructions and nuisances in navigable waters of the United States. *Willamette Iron Bridge Co. v. Hatch*,

125 U.S. 1, 8 S.Ct. 811, 31 L.Ed. 629 (1888). Therefore, the Court held that a private party could not obtain an injunction against the construction of a bridge over a navigable water. Congress promptly responded by enacting section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, which forbids obstructions not affirmatively authorized by law. This section, with minor changes, became section 10 of the 1899 Act. Since that time, courts have granted relief to private parties who suffer special injury because of unauthorized obstructions. For example, in *Neches Canal Co. v. Miller & Vidor Lumber Co.*, 24 F.2d 763 (5th Cir. 1928), a lumber company sued to recover losses caused by the construction of an unauthorized sand dam in the Neches River. The company recovered the expense it had incurred in raising its logs, which had sunk in the river because of the obstruction. In *Tatum v. Blackstock*, 319 F.2d 397 (5th Cir. 1963), a landowner with property adjacent to navigable waters sought to enjoin unauthorized dredging and filling, which would have altered the flow of the navigable waters to the detriment of his property. The court upheld a preliminary injunction against further activity until the Corps of Engineers issued a permit. Recently, our own court remanded for trial one of the consolidated appeals in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978), in which a private association contended that diked evaporation ponds in and around Bair Island in San Francisco Bay were built in violation of the Act because Corps permits had not been obtained.[7]

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[7]The intervening state water agencies contend that the Act is meant to benefit only those who are involved in navigational pursuits. The cases cited above amply refute the contention that the Act is so limited. All *users* of navigable waters are beneficiaries of the Act.

The federal parties argue that only the federal government is a beneficiary of the Act, relying upon an isolated statement of the Supreme Court in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201, 88 S.Ct. 379, 386, 19 L.Ed.2d 407 (1967), that "a principal beneficiary of the Act, if not the principal beneficiary, is the Government itself." *Wyandotte*, however, does not preclude private parties from also being recognized as beneficiaries of the Act.[5] Indeed, the Court's pronouncement, which expressly leaves open the class for whose benefit the Act was passed, was made in the context of expanding, not contracting, the remedies under the Act. As the District Court succinctly stated, "Sections 9 and 10 were enacted both to prevent injuries to private parties as a result of obstructions to navigable capacity which were not authorized by the United States and to allow the United States to regulate obstructions to the navigable capacity of its navigable waterways." 400 F.Supp. at 623 (footnote omitted).

B. *Legislative Intent*

The legislative history of the Rivers and Harbors Act of

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[5]The Supreme Court, itself, at least *sub silentio*, has recognized others as beneficiaries of the Act. In *Wisconsin v. Illinois*, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929), the plaintiffs, alleging in their complaint a violation of the Act, sought to enjoin the withdrawal of 8,500 cubic feet of water per second from Lake Michigan. The defendants, having received a permit from the Secretary of War authorizing the withdrawal, raised the Act as a defense. Significantly, the Court, not pausing to question whether plaintiffs had the right to invoke the protection of the Act, only stated that the facts pleaded by plaintiffs constituted a cause of action. *Id.* at 409, 49 S.Ct. 163. The Court then proceeded directly to a review of the defendants' activity. Finding that the defendants' permit had authorized only a temporary withdrawal of water and that absent continuing authorization the withdrawal was unlawful, the Court held that the withdrawal should be enjoined. *Id.* at 417-21, 49 S.Ct. 163. This case, standing alone, might constitute adequate authority for allowing others beside the federal government to enforce the requirements of the Rivers and Harbors Act. The decision openly recognizes that others are beneficiaries of the Act's provisions.

1899 does not reflect a congressional intent either to afford a private remedy or to deny one.[9] Nor is the statutory language itself determinative. Section 12 of the Act provides for the enforcement of section 10, making a violation of section 10 a misdemeanor punishable by either a fine or imprisonment and authorizing a district court to enjoin the violation.[10] Section 17 of the Act, in conjunction with sec-

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[9]The intervening state water agencies contend that the legislative history does suggest an intent to foreclose private enforcement of the Act. By amendment to a bill considered prior to the 1890 statute, which later became part of 1899 Act, the Senate eliminated language allowing suit by private persons and substituted language restricting enforcement to United States Attorneys. S.27, 50th Cong., 1st Sess., 19 Cong.Rec. 2338 (1887). A close reading of the amendment, however, discloses that the Senate was addressing the question whether a private party could enforce the penal provisions of the legislation. It is generally agreed that such *qui tam* actions are not permitted. *See, e.g., Jacklovich v. Interlake, Inc.*, 458 F.2d 923 (7th Cir. 1972); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972). The amendment does not indicate a legislative intent to preclude other private actions under the 1899 Act.

[10]Section 12 provides:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

33 U.S.C. § 406 (1970). Although this section expressly mentions enjoining only the erection of "structures" in violation of section 10, it is now settled that a District Court may enjoin any obstruction that violates section 10. *United States v. Republic Steel Corp.*, 362 U.S. 482, 491-92, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960).

tion 12, places the duty of enforcement upon the Attorney General and the Department of Justice.[11]

Normally, these express statutory provisions would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut this presumption. *See Securities Investor Corp. v. Barbour, supra*, 421 U.S. at 419, 95 S.Ct. 1733, *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra*, 414 U.S. at 458, 94 S.Ct. 690. This principle, however, does not apply to the Rivers and Harbors Act of 1899. The Supreme Court has consistently construed

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[11]Section 17 provides:

> The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

33 U.S.C. § 413 (1970).

the Act's language in a manner apparently aimed toward effectuating the underlying statutory policies. *See, e.g., Wyandotte Transp. Co. v. United States, supra,* 389 U.S. at 201, 88 S.Ct. 379; *United States v. Republic Steel Corp.,* 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960). The Court has already determined that the penal provisions of the Act do not preclude implication of a civil action. *Cort v. Ash, supra,* 422 U.S. at 79, 95 S.Ct. 2080. *Wyandotte Transp. Co. v. United States, supra,* 389 U.S. at 201-202, 88 S.Ct. 379. Accordingly, we believe that the Attorney General's enforcement responsibilities were not meant to foreclose the implication that private actions are authorized to promote the purposes of section 10.[12] Rather,

> [w]e read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes . . . that "A river is more than an amenity, it is a treasure," forbids a narrow cramped reading either of § 13 or of § 10.

Republic Steel Corp., supra, 362 U.S. at 491, 80 S.Ct. at 890.

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[12]Examining a similar statutory scheme, the Supreme Court held that a provision expressly providing for enforcement by the Attorney General did not preclude implication of a private remedy. In *Allen v. State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), the Court identified a private right of action to enforce the Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973p (1970), notwithstanding an express provision that "the Attorney General may institute . . . an action for preventive relief," *id.* § 1973(j). 393 U.S. at 554-57, 89 S.Ct. 817.

Like the Voting Rights Act of 1965, the Rivers and Harbors Act of 1899 provides that "proper proceedings . . . may be instituted under the direction of the Attorney General of the United States." 33 U.S.C. § 406 (1970). As in *Allen,* the express reference does not necessarily preclude a private right of action. Rather, we must further determine whether it would be consistent with the broad purposes of the Act to imply such a remedy.

C. *Consistency with Legislative Scheme*

Our third inquiry concerns the consistency of implying a private right of action under section 10 with the underlying purposes of the legislative scheme. We perceive a private right of action as both consistent with the purposes of the Rivers and Harbors Act and complementary to its enforcement.

Section 10 prohibits unreasonable obstructions to navigable capacity, and in those instances specifically enumerated in its second and third clauses, the statute directs the Secretary of the Army, acting upon the recommendation of the Chief of Engineers, to determine what constitutes an unreasonable obstruction. *Wisconsin v. Illinois*, 278 U.S. 367, 413, 49 S.Ct. 163, 73 L.Ed. 426 (1929). The underlying purpose of section 10 is clear. That purpose is to keep the navigable waters of the United States free from unreasonable obstructions. Private suits such as the present one promote this policy by assuring Corps review of those activities that could obstruct the navigable capacity of the Nation's waters by altering or modifying their course, condition, or capacity.[13]

The District Court reasoned that exclusive enforcement of the criminal provisions should be vested in the Attorney General but that the Attorney General had neither the time nor the resources to seek redress for all violations of the Act. 400 F.Supp. at 624-25. The court concluded that a

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[13]We do not mean to imply that the Corps should consider only navigational interests when issuing a permit. Since the passage of the 1899 Act, Congress has enacted additional legislation directing federal officials to consider ecological and environmental effects in addition to navigation when discharging their duty. *See, e.g.*, Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c (1976); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (1970 & Supp. V 1975). *See generally Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971).

private right of action was necessary to protect private parties who suffer special injuries because of these violations. *Id.* at 625. We agree,[14] but we do not rest this conclusion solely upon recognition of the Attorney General's lack of resources. An additional problem, exemplified by this case, is that the federal government, which is specifically directed to enforce the Act, may itself be charged with violating its provisions.[15] Unless private rights of action are permitted, federal violations could operate so as to wholly frustrate the purposes of the Act. *See Illinois ex rel. Scott v. Hoffman*, 425 F.Supp. 71, 75-76 (S.D.Ill.1977); *cf. Miller v. Mallery*, 410 F.Supp. 1283, 1289 (D.Or.1976).

Unlike the possible result faced by the Supreme Court in *Securities Investor Protection Corp. v. Barbour, supra*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263, and *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646, implication of a private remedy under section 10 does not raise the spectre of judicial encroachment upon executive policymaking. It is not here argued that the Corps cannot issue permits for the continued operation of the Tracy and Delta Pumping Plants. The Corps can grant to the ap-

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[14] *See generally River v. Richmond Metropolitan Auth.*, 359 F.Supp. 611 (E.D.Va.), aff'd. 481 F.2d 1280 (4th Cir. 1973).

[15] In this respect, the federal appellants base one of their arguments against upholding a private right of action on the contention that to allow such an action would amount to finding an implied waiver of sovereign immunity. We, however, have the obligation to ensure federal compliance with those measures enacted by Congress to protect the environment. To the extent that the involved federal officials have exceeded their statutory authority or have exercised that authority in an illegal manner, this suit falls within one of the well recognized exceptions to sovereign immunity. *City of Santa Clara v. Andrus*, 572 F.2d 660, 679 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978); *Association of Northwest Steelheaders v. United States Army Corps of Eng'rs*, 485 F.2d 67, 69 (9th Cir. 1973); *Washington v. Udall*, 417 F.2d 1310, 1314 (9th Cir. 1969).

propriate federal and state officers permission to continue their pumping operations. If permits are properly obtained, the right of the appellees to enforce section 10 will not then extend so as to entitle them to obtain redress for their injury. It remains true that the Congress and the Corps ultimately decide which activities affecting navigable waters are permissible.[16]

D. *State Law*

Finally, we hold that this case is not the type of action traditionally relegated to state law. The appellants focus on allegations of the possible adverse effects upon fish and wildlife, contending that these are basically state concerns to be remedied under the law of nuisance. This approach is much too narrow. Activities affecting the navigable ca-

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[16]This result distinguishes *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) and *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974), two Supreme Court cases in which no private rights of action were found to exist. In both of those cases, the plaintiffs sought to challenge decisions made by corporate entities created by Congress to solve public problems. Had the Court recognized a private right of action, the subsequent litigation would have undercut the decisions of the corporations, thus upsetting the legislative scheme devised by Congress. *Securities Investor Protection Corp. v. Barbour*, *supra*, 421 U.S. at 422-23, 95 S.Ct. 1733; *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, *supra* 414 U.S. at 463, 94 S.Ct. 690. Additionally, in both instances, the legislation and its relevant history indicated an attempt to preclude private rights of action. *Securities Investor Protection Corp. v. Barbour*, *supra* 421 U.S. at 420 n. 3, 421, 95 S.Ct. 1733; *National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers*, *supra*, 414 U.S. at 457-61, 94 S.Ct. 690. Thus, no private right of action was found to exist.

Here, the private right of action asserted by the appellees is not aimed at the decisions of the agency enforcing the Act. They are not challenging the issuance of permits, nor are they attempting to require the United States to prosecute a party for violation of the Act. Rather than attempting to disrupt the legislative scheme, the appellees are seeking to enforce that scheme.

pacity of navigable waters of the United States are matters of federal, not state, law. *Wyandotte Transportation Co. v. United States, supra*, 389 U.S. at 201, 88 S.Ct. 379. We agree with the District Court that

> [t]here is a federal interest in protecting persons from injuries resulting from unauthorized obstructions to the navigable capacity of navigable waters of the United States and possible federal intrusion into the area of state nuisance law is necessary so that the federal interest asserted here will not be compromised by contrary state law.

400 F.Supp. at 625.

We emphasize, even though such emphasis should be unnecessary, that our decision does not permit private parties to enforce the criminal provisions of the Rivers and Harbors Act. The Act does not authorize *qui tam* actions[17] to enforce its criminal penalties. Section 17 of the Act, 33 U.S.C. § 413 (1970), vests exclusive enforcement of its penal provisions in the Department of Justice. *Jacklovich v. Interlake, Inc.*, 458 F.2d 923 (7th Cir. 1972); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972); *Durning v. ITT Rayonier, Inc.*, 325 F.Supp. 446 (W.D. Wash. 1970). Nor do we intend to hold that private parties may sue on behalf of the general public or seek to enjoin violations of section 13 of the Act, 33 U.S.C. § 407 (1970). These questions are not before us, but there is good and sufficient reason to express our thought that this responsibility is also committed exclusively to the Department of Justice. *See Connecticut Action Now, supra* at 88-

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[17] A *qui tam* action is a civil proceeding in which an informer sues for the Government, as well as for himself, to recover a penalty under a particular statute. Statutory authority for the action must be specifically provided. *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 84 (2d Cir. 1972).

89; *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140, 1144-48 (N.D.Ala. 1971), *aff'd*, 456 F.2d 1294 (5th Cir. 1972), *cert. denied*, 410 U.S. 946, 93 S.Ct. 1352, 35 L.Ed.2d 613 (1973); *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F.Supp. 412, 416 (N.D., M.D., S.D.Ala. 1971), *aff'd*, 447 F.2d 1304 (5th Cir. 1971) (per curiam).

Accordingly, we hold that private parties who suffer special injuries because of unauthorized activities affecting the navigable capacity of our Nation's waters may sue to enforce the permit requirements of section 10. There are no indicia of legislative intent to exclude a private right of action, and without this remedy, users of the Delta and the San Francisco Bay would be unable to obtain Corps review of the activities that are causing them injury.

III. STANDING

The intervening state water agencies contend that the appellees lacked standing to bring their action. Under the Supreme Court cases of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), as succinctly summarized by us in *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976), a plaintiff must allege "(a) a particularized injury (b) concretely and demonstrably resulting from defendant's action (c) which injury will be redressed by the remedy sought." *Id.* at 1349.

The individual appellees meet the standard.[18] Both have alleged a particularized injury caused by the pumping, and, although the injury may continue if the Corps eventually allows continued pumping, it may be redressed if the Corps restricts or regulates the pumping operation. Unlike the plaintiffs in *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. 26, 96 S.Ct. 1917, who sued the Secretary of the Treasury to contest a revenue ruling favorable to nonprofit hospitals offering only emergency room services to indigents, the individual plaintiffs' injury "can be traced to the challenged action of the defendant,

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[18]The District Court found:

> Plaintiffs in this case are The Sierra Club, Friends of the Earth, Hank Schramm, and William Dixon. The Sierra Club is a nonprofit California corporation having in excess of 130,000 members of whom more than 40,000 live in San Francisco Bay and the Sacramento-San Joaquin Delta areas. Included in the membership of the Sierra Club are many persons who use the waters referred to in the complaint for recreational purposes, including, but not limited to, boating, fishing and swimming. The stated purposes of the Sierra Club included the preservation and conservation of the natural resources, fish, and wildlife of the United States, including its rivers, bays, wetlands, deltas, and estuarine areas.
>
> Friends of the Earth is a nonprofit New York corporation which has its principal place of business in San Francisco. Its stated purposes include the preservation, restoration, and rational use of the environment.
>
> Hank Schramm is and has been engaged for the past 20 years in the business of commercial fishing and the operation of sports fishing and party boats in the San Francisco Bay and the Pacific Ocean. Schramm has an economic interest in this controversy since he depends for his livelihood on the maintenance, preservation, and conservation of sports and commercial fisheries in the San Francisco Bay and the adjoining waters of the Pacific Ocean.
>
> William Dixon owns substantial property in the Delta, including a partnership interest in the St. Germain Duck Club on Simmons Island, and consequently has an economic interest in the maintenance, preservation, and conservation of adequate non-polluted supplies of water in the Delta and San Francisco Bay regions.

400 F.Supp. at 619.

and [is] not injury that results from the independent action of some third party not before the Court." *Simon, supra* at 41-42, 96 S.Ct. at 1926.[19]

The intervenors further contend that the appellees did not meet the second standing requirement, a nonconstitutional requirement, that "the interest sought to be protected by the complainant [is] arguably within the zone of interest to be protected or regulated by the statute in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970); *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 39, n.19, 96 S.Ct. 1917. The intervenors' argument is founded upon their belief that the zone of interest to be protected encompasses only navigational pursuits, a tenet that is incorrect. Under section 10 the Corps must consider not only the effect of an activity upon navigation, but also its impact upon the environment. *United States v. Joseph G. Moretti, Inc.*, 526 F.2d 1306, 1310 (5th Cir. 1976), *Zabel v. Tabb*, 430 F.2d 199, 213-14 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). We therefore hold that the appellees' interest in the environmental quality of the Delta and San Francisco Bay is within the zone of interests protected under the Rivers and Harbors Act. *See Alameda Con-*

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[19]The intervenors argue that no evidence of injury to these plaintiffs was adduced at trial, and, thus, that the appellees were without standing. Under the pretrial order, however, the District Court has deferred taking evidence relating to the environmental effect of the pumping upon the Delta and the San Francisco Bay until the second phase of the trial, which has not yet occurred. Certainly, the intervenors do not dispute that there is evidence that the pumping has caused net flow reversals and lowered water levels in the Delta. The appellees have sufficiently alleged a demonstrable, particularized injury that may result from the pumping activities, and they will have the opportunity to prove their injury in the second portion of the bifurcated trial.

servation Association v. California, 437 F.2d 1087, 1091 (9th Cir.), *cert. denied*, 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 649 (1971) (standing for private party alleging injury to fish).

Because the individual appellees possess the requisite standing to maintain this suit, it would ordinarily be needless for us to consider whether the environmental associations also have standing. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-64 & n.9, 97 S.Ct. 555, 50 L.Ed2d 450 (1977). Since the second portion of the bifurcated trial has not yet occurred, however, we think it desirable to offer some procedural guidelines to the District Court. We shall address the issue briefly. An organization's abstract concern with a subject is insufficient to confer the requisite standing, *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), but when the organization fails to allege an injury to itself as an organization, it can establish standing by showing that it represents individual members who have themselves suffered injury and who thus could have properly sued in their own right. *Simon v. Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 40, 96 S.Ct. 1917; *Warth v. Seldin*, *supra*, 422 U.S. at 511, 95 S.Ct. 2197. The Sierra Club has satisfied the test by alleging injuries to members who use the San Francisco Bay for boating and recreational purposes. Friends of the Earth, on the other hand, has not met the requirement. It has alleged nothing more than a general organizational interest in preservation of the environment.[20] Thus, it has no standing to invoke judicial resolution of the controversy. The judgment of the District Court is vacated as to Friends of the Earth, and upon remand

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[20] *See* note 18, *supra*.

the District Court will dismiss the complaint as to Friends of the Earth.

IV. SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899

We now turn to the merits. First, the appellants attack the trial court's decision on the scope of section 10 of the Rivers and Harbors Act of 1899.[21]

The statute contains three distinct proscriptive clauses. The first clause flatly prohibits the creation of any obstruction to "the navigable capacity of any of the waters of the United States" unless affirmatively authorized by Congress. The second and third clauses, on the other hand, permit certain activities in navigable waters provided that they proceed on plans "recommended by the Chief of Engineers and authorized by the Secretary of the Army." These activities include the building of structures in navigable waters and the alteration or modification "in any manner" of the condition, capacity, or channel of any navigable water.

The District Court held that

> the operation of the Tracy and Delta Plants obstructs the navigable capacity of various waters in the Delta, and because these obstructions are the result of modification or alteration of the condition or capacity of the channel of navigable water, they are governed by the third clause of Section 10.

400 F.Supp. at 638. In so ruling, the court accepted the convincing factual evidence that export pumping by the Tracy and Delta facilities had lowered the level of navigable waters in the Delta by as much as 1.5 feet in at least one

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[21] *See* note 4, *supra*.

place and had caused net flow reversals in certain channels.[22] The District Court apparently believed that the controlling issue was whether a given diversion constituted an obstruction to navigable capacity.[23]

We decline to adopt the District Court's approach, believing that it would necessarily present the courts with difficult definitional problems in a variety of factual contexts. Instead, we interpret clauses 2 and 3 of section 10 as constituting a legislative enumeration of specific obstructions to navigable capacity that require Corps authorization.

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[22]In their opening brief the state appellants assert that the trial court entertained "the mistaken belief" that water levels on the San Joaquin River would be lowered by 1.5 feet at low tide, a fact which was disputed by the testimony of a civil engineer with the California State Department of Water Resources. Brief for Appellants Norman Livermore and John Teerink [hereinafter cited as State Opening Brief] at 13. The District Court opinion, however, explicitly notes the difference of opinion as to the amount of diversionary impact on San Joaquin River levels. 400 F.Supp. at 630 n.27. The court clearly rested its finding of obstruction to navigable capacity on separate evidence that the water level would recede at least 1 to 1.5 feet in the vicinity of Clifton Court Ferry and that operation of the pumping plants was causing net flow reversals on the San Joaquin River and the Old and Middle Rivers. *Id.* at 631-32.

[23]The court defined "navigable capacity" as "the capacity for navigation over any part of the waters in question when in their normal condition," and defined "obstruction to navigable capacity" as "to interfere with or diminish the navigable capacity of the waterway in question." 400 F.Supp. at 630 n.23 (*citing United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), and *Hubbard v. Fort*, 188 F. 987, 996 (C.C.D.N.J.1911)). The court observed that in *Rio Grande* the Supreme Court had stated that not every appropriation of the upper waters of a navigable stream would constitute an "obstruction" to navigable capacity: "The question always is one of fact, whether such appropriation *substantially* interferes with the navigable capacity within the limits where navigation is a recognized fact." *Rio Grande, supra*, 174 U.S. at 709, 19 S.Ct. at 777 *cited at* 400 F.Supp. at 630 n.24 (emphasis added). The question thus becomes whether in a given case a proved effect on navigable waters is substantial enough to constitute an obstruction to navigable capacity. The difficulty with this approach is that it emphasizes too strongly the question whether an "obstruction to navigable capacity" has occurred at the expense of the different question whether there has been any alteration or modification of the condition or capacity of navigable waters.

In other words, the building activities mentioned in clauses 2 and 3 are *presumed* to be obstructions to navigable capacity. Under the statute the Secretary of the Army determines whether these obstructions are reasonable. Thus, the facts in this case should be analyzed from the standpoint of whether there has been any modification or alteration of the condition or capacity of a navigable stream, rather than first determining whether there has been an obstruction to navigable capacity. [24]When one undertakes any of the activities described in clause 2 or by his activities brings about any of the results specified in clause 3, he violates section 10 if he has not first sought and obtained a permit from the Corps of Engineers.

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[24]The intervening appellants insist on the narrowest possible definition of navigable capacity. They argue that, in order to show the existence of an obstruction to navigable capacity, plaintiffs must prove, "among other things," the types of vessels that utilize a particular channel, the natural capacity of that channel to accommodate such navigation, the "navigational pursuits" of these types of vessels, and the degree to which changes in the condition or capacity of the channel may interfere with such pursuits. Brief for Intervenors and Appellants Kern County Water Agency, et al. [hereinafter cited as Intervenors' Brief] at 37-38. We fail to see any meaningful distinction between this definition of obstruction to "navigable capacity" and a showing of some effect on "actual navigation." Moreover, this argument of the intervenors is based on a fundamentally fallacious interpretation of section 10 and its three clauses, the premise of which is that under section 10 of the Rivers and Harbors Act of 1899,

> [n]ot all construction or work of the type described in Clauses 2 and 3 require approval of the Secretary of the Army. Section 10 approval is not required unless the structure or work would create some kind of obstruction, and then the Secretary is called on to determine the obstruction's reasonableness.

Id. at 35. This interpretation, which introduces the requirement of a procedural determination of substantial obstruction to navigable capacity prior to submission to the Corps for approval, leaves unaddressed the obvious problem of who is responsible for actually making the interpretation. As we see it, our acceptance of this construction of section 10 would stand the statute on its head.

In *Sanitary District v. United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925), the Supreme Court, construing the Rivers and Harbors Act of 1899, held that the diversion of water from Lake Michigan by the Sanitary District of Chicago fell within the scope of section 10 and was therefore beyond the power of a state in the absence of specific authorization by the Corps of Engineers. The Court referred to the fact that the Secretary of War had reviewed the Chicago Drainage Channel diversions in 1913, "including the obvious fact that so large a withdrawal would lower the levels of the Lakes and the overwhelming evidence that it would affect navigation." *Id.* at 430, 45 S.Ct. at 180. Nevertheless, Mr. Justice Holmes, for the Court, made no specific findings or determinations as to the effect on the actual navigable capacity of the lakes and rivers affected. The Court wrote:

> Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case.
>
> * * *
>
> It is a broad expression of policy in unmistakable terms, advancing upon an earlier Act of September 19, 1890, . . . which forbade obstruction to navigable capacity "not affirmatively authorized by law". . . . There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity, . . . without regard to remote questions of

> policy. It is applied prospectively to the water henceforth to be withdrawn. This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War.

266 U.S. at 426, 429, 45 S.Ct. at 179-180.

Four years later, in *Wisconsin v. Illinois, supra*, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426, the Supreme Court again dealt with massive diversions by the Sanitary District of Chicago, which had lowered, by "not less than six inches," the levels of Lakes Michigan, Huron, Erie, and Ontario, their connecting waterways, and the St. Lawrence River above tidewater. Id. at 400, 49 S.Ct. 163. Chief Justice Taft wrote:

> [T]he broad words of the first clause of . . . [section 10] were not intended to limit the second and third clauses and . . . *Congress' purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War.* . . .
>
> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and *in the cases described in the second and third clauses of Section 10*, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine *what in the particular cases constituted an unreasonable obstruction.*

278 U.S. at 413, 49 S.Ct. at 170 (emphasis added). In short, the Corps must authorize any of the structures or activities enumerated in clauses 2 and 3, which are *presumed* to constitute obstructions. The need for applying to the Corps for a permit does not depend on some prior determination that there has been an obstruction to navigable capacity.

Even more explicit is the opinion of the Supreme Court in *United States v. Republic Steel Corp., supra*, 362 U.S. 482, 80 S.Ct. 884. There, the Court held that the unauthorized deposit of industrial solids in the Calumet River, which reduced its depth by four to nine feet in some places, constituted an obstruction to navigable capacity and thus a violation of section 10. The Court carefully distinguished between the three clauses of the section:

> The reach of § 10 seems plain. Certain types of structures, enumerated in the second clause, may not be erected "in" any navigable river without approval by the Secretary of the Army. Nor may excavations or fills, described in the third clause, that alter or modify "the course, location, condition, or capacity of" a navigable river be made unless "the work" has been approved by the Secretary of the Army. There is, apart from these particularized invasions of navigable rivers, which the Secretary of the Army may approve, the generalized first clause which prohibits "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity" of such rivers. *We can only conclude that Congress planned to ban any type of "obstruction," not merely those specifically made subject to approval by the Secretary of the Army. It seems, moreover, that the first clause being specifically aimed at "navigable capacity" serves an end that may at times be broader than those served by the other clauses. Some structures mentioned in the second clause may only deter movements in commerce, falling short of adversely affecting navigable capacity. And navigable capacity of a waterway may conceivably be affected by means other than the excavations and fills mentioned in the third clause.* We would need to strain hard to conclude that the only obstructions banned by

> §10 are those enumerated in the second and third clauses. *In short, the first clause is aimed at protecting "navigable capacity," though it is adversely affected in ways other than those specified in the other clauses.*

362 U.S. at 486-87, 80 S.Ct. at 887-888 (emphasis added). Clearly, the structures and activities set forth in the second and third clauses need not be shown to obstruct navigable capacity before federal authorization is required by the terms of the statute.

Finally, recent Fifth Circuit authority has established beyond cavil that an alteration or modification of navigable waters is sufficient to trigger the permit requirement of section 10 of the Rivers and Harbors Act. In *United States v. Joseph G. Moretti, Inc. (Moretti I)*, 478 F.2d 418, 429 n.37 (5th Cir. 1973), the Fifth Circuit held that "any filling of navigable waters creates an obstruction to navigation." When the same party came before the Fifth Circuit again, the court held that to trigger the permit requirements of the third clause of section 10, a party need only prove

> factual circumstances showing some effect upon navigable waters, some alteration or modification of either course, location, condition or capacity of those waters. These statutory terms are broad and undefined. So long as activities fall within this generous scope, those activities are subject to the jurisdiction of the Corps.

United States v. Joseph G. Moretti, Inc. (Moretti II), 526 F.2d 1306, 1309 (5th Cir. 1976);[25] *accord, Weiszmann v. District Engineer, United States Army Corps of Engineers,*

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[25]Apparently, under *Moretti II* a persuasive showing of "damaging ecological effects upon navigable waters" suffices to establish an alteration or modification in the condition and capacity of waters violating section 10, clause 3. *Id.* at 1310. Because of our conclusion and the specific issues that are before us, we express no opinion as to the extent to which ecological considerations may trigger the need for a permit under section 10.

526 F.2d 1302, 1305 (5th Cir. 1976); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1296-99 (5th Cir. 1976).

The state appellants and intervenors, however, present another argument in support of their interpretation of section 10. They argue that Congress has left to the states the regulation of water rights including direct water supply diversions, and that

> [t]o a large extent Congress has chosen to subordinate navigation uses to those diversions. Consequently application of Section 10 of the 1899 Act to State authorized water supply diversions requires a substantially greater demonstration of tangible interference with navigable capacity, than does application of Section 10 to structures, fills, or sewage dilution diversion activities that do not relate to public water supply.

Intervenors' Brief, *supra* note 24, at 46. *See also* State Opening Brief, *supra* note 22, at 14-20. To support their argument, those parties cite various congressional enactments, primarily in the area of reclamation, which contain generalized statements announcing a congressional policy of federal noninterference in state water laws and rights.[26]

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[26]In the appendix to their brief, the intervenors set our excerpts from 37 statutes containing references to congressional recognition of state water rights, particularly in the area of state-authorized water diversions for irrigation or consumption purposes. Typical of these statements is one found in section 8 of the Reclamation Act of June 17, 1902, 43 U.S.C. § 383 (1970), which provides that nothing in that Act

> shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Other representative statutes cited by the intervenors include the Flood Control Act of 1944, 33 U.S.C. § 701-1(b) (1970); the Water Supply Act of 1958, 43 U.S.C. § 390b(a) (1970); and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251(b), 1370 (Supp. V 1975).

The case authority interpreting the reclamation statutes makes it clear to us that a principal purpose of such reference to state law "is to leave to state law the *definition* of the property interests, if any, for which *compensation* must be made" when these state or private rights and interests are acquired by eminent domain. *City of Fresno v. California*, 372 U.S. 627, 629-30, 83 S.Ct. 996, 998, 10 L.Ed.2d 28 (1963) (emphasis added). The Supreme Court, analyzing the effect on the California Central Valley Project of broad language recognizing state water rights in section 8 of the Reclamation Act of 1902,[27] explained:

> [I]t merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in [*State of*] *Nebraska v.* [*State of*] *Wyoming*, *supra* [325 U.S. 589, 615, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945)]: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system."

Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291, 78 S.Ct. 1174, 1183-1184, 2 L.Ed.2d 1313 (1958). Similarly, in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950), the Supreme Court specifically held that section 8 of the 1902 Act reflected a congressional intent, for the purposes of the Act, not to take water rights without compensation under the navigational servitude. *Id.* at 737-39, 70 S.Ct. 955.

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[27] 43 U.S.C. §383 (1970), *quoted at* note 26 *supra*.

As the Court has recently indicated, just last Term, the general restriction on federal action embodied in section 10 is that the Secretary of the Interior must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *California v. United States*, 438 U.S. 645, 665, 98 S.Ct. 2985, 2996, 57 L.Ed.2d 1018 (1978). In that case, the Court, correcting some confusion concerning the scope of section 8 engendered by its prior opinions, ruled that the recognition of state law mandated by section 8 is not limited to situations in which the United States acquires water rights:

> Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchaser or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water."

438 U.S. at 674-75, 98 S.Ct. at 3001. Therefore, the State of California was permitted to impose any conditions on the United States Bureau of Reclamation's appropriation of water from the Central Valley Project that did not conflict with clear congressional directives authorizing the project. Mr. Justice Rehnquist, writing for the majority, emphasized that state water law governs federal operation of reclamation projects only to the extent that Congress has chosen not to legislate otherwise. The Court reaffirmed the validity of the basic holdings of *Ivanhoe, supra*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313, and *Fresno, Supra*, 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28, i.e., that specific congressional directives concerning reclamation override state law to the extent that there is a conflict between the two bodies of authority. 438 U.S. at 670-72, 98 S.Ct. at 2999; *see id.* at 670 n.23, 671 n.24, 98 S.Ct. 2985.

Section 8 of the 1902 Reclamation Act and the other statutory provisions for federal deference to state water rights do not lend support to the novel suggestion made by the appellants despite the new vitality, given those provisions by *California v. United States*. The congressional policy of compliance with state law for the appropriation, purchase, condemnation, and distribution of water rights, in the absence of express congressional provision to the contrary, cannot be lifted from the context of *reclamation* so as to enroach upon the express provisions of the Rivers and Harbors Act, a statute directly concerned with obstructions to and modifications of navigable waters, enacted under the congressional power over commerce and *navigation* *Cf. Gerlach, supra*, 339 U.S. at 731-42, 70 S.Ct. 955.

The Rivers and Harbors Act, of course, does not itself mention noninterference with state-authorized water supply diversion operations. The appellants point to no authority supporting their interpretation of section 10, under which the Act assertedly is to be applied differently in situations in which a state has authorized water diversions. In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), a case upon which the appellants attach some reliance, the Supreme Court clearly recognized that the federal authority over navigable waters delegated by Congress to the Corps under the Rivers and Harbors Act of 1890, the predecessor of the 1899 Act, overrides any state power to authorize a water diversion project that would adversely affect navigation. The power of states over waters within their dominions, the Court held

> is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural high-

> ways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any state action.

174 U.S. at 703, 19 S.Ct. at 775. The Court observed that prior to 1890 Congress, through legislation, "recognized and assented to the appropriation of water" by states and private entities organized under state law, but ruled that the Rivers and Harbors Act controlled the issue insofar as any conflict existed. Referring to the 1890 Act, the Court wrote:

> [I]t is obvious that Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of *non-navigable* streams in disregard of the old common-law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to *navigable waters nothing should be done to obstruct their navigability without the assent of the National Government*. It was an exercise by Congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams. . . . *The language is general, and must be given full scope*. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and *anything, wherever done or however done*, within the limits of the jurisdiction of the United States *which tends to destroy the navigable capacity* of one of the navigable waters of the United States, is within the terms of the prohibition. 174 U.S. at 708, 19 S.Ct. at 777 (emphasis added).

In *Sanitary District v. United States, supra*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352, the Supreme Court specifically dealt with state diversions of water for public health

purposes, describing as plenary the power of Congress to remove what it identifies as obstructions to interstate and foreign commerce.

> This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction.
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> * * *
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> The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. *There is no question that this power is superior to that of the States to provide for the Welfare or necessities of their inhabitants.* In matters where the States may act the action of Congress overrides what they have done. . . . But in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all.

266 U.S. at 425-26, 45 S.Ct. at 178-179 (emphasis added).

While states undeniably possess broad power to regulate their own navigable waters for the general welfare, the power clearly is, and should be subordinate to the federal navigational power unless Congress expressly defers to the state authority in the context of a specific statute. Since Congress did not so defer to state authority in the case of the Rivers and Harbors Act of 1899, the State of California's powers over navigable waters cannot narrow the authority

of the Corps over navigable waters as applied to state water diversions[28]

In sum, we hold that the lowering of water levels, as established in this case, amounts to an alteration or modification of the condition or capacity of Delta waters under clause 3 of section 10, and thus requires authorization by the Corps. This result follows without regard to the effect of the pumping plants on actual navigable capacity because a prior finding of obstruction to navigable capacity is not necessary in order to trigger the effect of clauses 2 and 3 of section 10. The federal authority set forth in the Rivers and Harbors Act of 1899 reigns paramount. Congressional deference to traditional state regulation of water rights, a consideration of significance in other contexts, does not operate to restrict the express policy of section 10.

V. AUTHORIZATION

Having determined that the construction and operation of the Tracy and Delta Plants require the approval of the Corps under section 10, the District Court then ruled that

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[28]The Court, in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), illustrated this proposition of overriding federal supremacy in the area of navigation with an example:

> The Hudson River runs within the limits of the State of New York. It is a navigable stream, and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a nonnavigable stream. Its waters are taken by the State of New York for domestic uses in the city of New York. Unquestionably the State of New York has a right to appropriate it waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned. . . .

174 U.S. at 709, 19 S.Ct. at 777.

both facilities lacked the required authorization. The respective appellants offer different arguments in respect to the Tracy Pumping Plant, a federal facility, and the California's Delta Pumping Plant. The federal appellants contend that various congressional acts affirmatively authorized the Tracy Plant under section 10, clause 1. The state appellants maintain that various section 10 permits issued over the years for certain components of the Delta Plant constitute authorization for the entire Delta Plant. In addition, the state appellants urge that a Federal Power Commission license for portions of the California Water Project eliminated any need to obtain section 10 approval. Other contentions made by the appellants in the District Court are not pressed on this appeal. We first consider the question of congressional authorization of the Tracy Pumping Plant.

A. *Congressional Authorization of the Tracy Pumping Plant.*

The trial court found no congressional authorization of the Tracy Pumping Plant. It based its decision on the legal conclusion that "[t]he initial authorization to create an obstruction must rest on express and not implied Congressional authority. . . . The approval or funding of a facility does not compromise Congress's right to control its operation." 400 F.Supp. at 637 (*citing Sanitary District v. United States supra*, 266 U.S. at 428, 45 S.Ct. 176, and *Hubbard v. Fort*, 188 F. 987, 996 (C.C.D.N.J.1911)[29]

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[29]The District Court principally relied upon the following statement from *Sanitary District*:

> The act [of March 2, 1827, ch. 51, 4 Stat. 234] granted land to Illinois in aid of a canal to be opened by the State for the purpose of uniting the waters of the Illinois River with those of Lake Michigan, but if it has any bearing on the present case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the Lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. *Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the*

The rationale of the District Court sweeps too broadly. In our view, congressional approval or authorization may be found in virtually any type of statute, including appropriations statutes, so long as it is demonstrated that Congress had knowledge of the precise action or project at issue and was explicitly and specifically addressing that project. *United States v. Arizona*, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935), casts light upon the principle. There, the Supreme Court held that the Parker Dam, which the United States planned to build in the Colorado River between Arizona and California, was not authorized by any congressional act, as required by the Rivers and Harbors Act of 1899. The Government, contending that Congress had approved the dam, cited a 1904 Act authorizing the diversion of Colorado River waters for the purpose of irrigating adjoining lands on Indian reservations. *Id.* at 185, 55 S.Ct. 666. In support of its construction, the Government asserted that under the 1904 Act another structure, the Laguna Dam, had previously been built across the Colorado.

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amount of water to be drawn from Lake Michigan. It seems that a less amount than now passes through the canal would suffice for the connection which the United States has wished to establish and maintain.

266 U.S. at 427-28, 45 S.Ct. at 179 (emphasis added). Applying what it perceived to be the Supreme Court rule, the District Court held:

> In the instant case none of the acts in question either contain sufficiently explicit language or are accompanied by a legislative history clearly manifesting approval of the facilities for the purpose of Section 10. *For the most part* these acts do not even refer specifically to the pumping plant but rather are very general approvals of the Central Valley Project or the San Luis unit. *All Congress did was authorize the construction of those projects and appropriate funds for them*. Congress did not, however, agree to relinquish its Section 10 responsibilities or exercise this power in any respect. *Even if Congress had gone so far as specifically to fund the construction of the Tracy Plant precisely as it stands today, this fact would not constitute authorization to operate it, as before operation occurred, either Congress or the Corps of Engineers would have to consider within what Section 10 parameters the Tracy Plant could operate and issue an appropriate authorization*.

(footnote continued on following page)

Rejecting the Government's argument, the Supreme Court pointed out that "Congress has made appropriations for the benefit of the project of which it [the Laguna Dam] is a part and so recognized and approved the building of the dam," citing Acts of 1916, 1917, and 1918 making appropriations for the Yuma Project, Arizona-California, which includes the Laguna Dam. *Id.* at 186 n.5, 55 S.Ct. 666. As to the Parker Dam, however, the Court refused to hold that Congress had authorized the project under the 1904 Act "by making appropriations for irrigation of lands in Indian reservations." *Id.* Unlike the situation in our case, the 1904 Act did not specifically address the project at issue. *Compare* Rivers and Harbors Act of 1937, ch. 832, 50 Stat. 844, 850 *quoted* at n.31 *infra* with Act of Apr. 21, 1904, § 25, 33 Stat.224.

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400 F.Supp. at 637-38 (emphasis added).

In the quoted passage from *Sanitary District* the Supreme Court strictly construed the actions of the United States as to the diversion of Lake Michigan waters. In that case the federal government had brought suit to enjoin the Sanitary District of Chicago from diverting water from the lake in excess of a specified amount. The District had defended on the basis of estoppel, arguing that "the United States has given its assent to all that has been done and . . . it is estopped to take the position" that the diversions constituted obstructions to navigable capacity. 266 U.S. at 427, 45 S.Ct at 179. It was, therefore, in the context of considering an argument of estoppel against the Government that Mr. Justice Holmes stated that the "strict construction of the Government's act" avoided the defendant's contention. Id. Accordingly, the import of *Sanitary District* is not that Congress must affirmatively authorize *both* construction and operation of a diversion project for it to be legal under section 10, as the District Court supposed. Instead, the Supreme Court simply stated that Congress is *not precluded* from setting limits on the amount of a water diversion even if it has previously authorized the specific project. An analogue in the instant case would arise if the federal government itself were actively seeking to restrict the amount of water diverted by the Tracy Plant. None contends that it could not do that, if it so chose. The right of the Congress to control the operation of a facility that it has previously approved, however, is not at issue here. In short, we cannot accept the proposition that *Sanitary District* supports the finding that section 10 requires separate approval by either Congress or the Corps for both the construction and the operation of a water diversion project.

United States v. Arizona, supra, teaches that Congress, while it may authorize a project by means of general appropriations legislation, must have known and intended that the specific facility in question was a part of the project for which it was making appropriations. This interpretation is supported by other cases holding that Congress may authorize activities by means of appropriations legislation that specifically and directly relates to the projects in question.[30] We also note that the Corps' administrative regulations governing issuance of permits are consistent with this principle:

> The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of Section 10. If an agency asserts that it has Congressional authorization meeting the test of Section 10 or would otherwise be exempt from the provisions of Section 10, *the legislative history and/or provisions of the Act should clearly demonstrate that Congress*

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[30]*See United States v. Dickerson,* 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940) (Congress could suspend certain military re-enlistment allowances, provided for by prior legislation, by means of an amendment to an appropriations bill); *Wisconsin v. Duluth,* 96 U.S. 379, 382-88, 24 L.Ed. 668 (1878) (by means of an appropriation, Congress had "adopted, recognized, and taken charge of" a project previously initiated privately without congressional authorization); *Friends of the Earth v. Armstrong,* 485 F.2d 1,9-10 (10th Cir. 1973) (en banc) (Congress can, by an appropriations act, suspend or modify a prior act concerning the spreading of waters impounded in Lake Powell into Rainbow Bridge National Monument), *cert. denied,* 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974); *United States v. Kennedy,* 278 F.2d 121, 122-23, 126 (9th Cir. 1960) (General Appropriation Act of 1951, Act of Sept. 6, 1950, 64 Stat. 595, appropriating funds for the National Park Service, provided necessary statutory authorization for taking of land within boundaries of Mount McKinley National Park); *cf. City of Santa Clara v. Andrus,* 572 F.2d 660, 672 (9th Cir.) *cert. denied,* 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978) (to show congressional ratification of an electrical power allocation scheme by appropriation of money, "the government must sustain the heavy burden of demonstrating Congressional knowledge of the precise course of action alleged to have been acquiesced in").

> *was approving the exact location and plans from which Congress could have considered the effect on navigable waters* of the United States or that Congress intended to exempt that agency from the requirements of Section 10.

33 C.F.R. § 322.3(c)(1) (1978) (emphasis added). Generally, a court should accord great weight to the construction of a statute by the agency responsible for its administration. *E.g., California v. United States, supra*, 438 U.S. at 676 n.30, 98 S.Ct. 2985; *Zemel v. Rusk*, 381 U.S. 1, 11, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

The question thus narrows itself to whether the various congressional statutes and legislative history concerning the Central Valley Project are so sufficiently specific as to the Tracy Pumping Plant as to constitute congressional authorization under section 10. In our view, the basic enactments authorizing the Central Valley Project in 1937 and the annual appropriations acts for operation and maintenance of the Central Valley Project, when read in light of the legislative history of the broad oversight exercised by the Congress over the project, constitute affirmative authorization of the Tracy Plant.

The Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 844, 850, reauthorized the entire Central Valley Project, theretofore authorized and established under the Emergency Relief Appropriation Act of 1935, 49 Stat. 115.[31] As of 1937, then, Congress had clearly authorized the Central

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[31]The Rivers and Harbors Act of 1937 declared the Central Valley Project

Valley Project, the general plans of which contemplated a large-scale diversion of water from the Delta to the San Joaquin Valley. Subsequently, Congress enacted the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187 (codified at 43 U.S.C. §§ 375a, 387-389, 485-485h, 485i-485k (1970)). Section 9(a) of the Act, 43 U.S.C. § 485h(a) (1970), provides that federal reclamation projects were to become automatically authorized when the Secretary of the Interior found them to be feasible and submitted a favorable report to the President and to the Congress.[32] On February

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to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, *providing for storage and for the delivery of the stored waters thereof*, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further*, That, except as herein otherwise specifically provided the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants *pumping plants*, transmission lines, and identical works *deemed necessary to said entire project*, and the Secretary of the Interior may enter into repayment contracts, and other neccessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law. . . .

Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 844, 850.

[32]Section 485h(a) reads, in pertinent part, as follows:

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply . . ., together with any allocation to flood control or navigation . . ., equal the total estimated cost of construction as determined by the Secretary, then the *new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary* If all such allocations do not equal said total estimated cost, the said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefor has been made by Act of Congress . . .

43 U.S.C. § 485h(a) (1970) (emphasis added.)

24, 1947, the Secretary of the Interior forwarded to Congress a Finding of Feasibility pursuant to the 1939 Reclamation Act. H.R. Doc. No. 146, 80th Cong., 1st Sess. (1947), *reprinted in* Engle, *Central Valley Project Documents*, H.R. Doc. No. 416, 84th Cong., 2d Sess., pt. 1, at 574 (1956). The feasibility report contained a detailed discussion of the Delta-Mendota Canal, the 115-mile canal connecting the Mendota Pool in the San Joaquin Valley with the Tracy Pumping Plant. The initial contract for construction of the Delta-Mendota Canal was dated June 14, 1946, and the canal's construction was completed prior to July 1, 1952. The initial construction contract for the Tracy Pumping Plant was made on June 23, 1947, with construction of the Plant completed prior to February 1, 1953.

Over the years Congress has repeatedly appropriated funds for the Tracy facilities. These appropriations acts have generally lumped together funds for the Central Valley Project as a whole. As such, the situation appears to come within the dictum of *United States v. Arizona* that "Congress has made appropriations for the benefit of the project of which it is a part and so *recognized and approved* the building" of the project under the Rivers and Harbors Act of 1899. *United States v. Arizona, supra*, 295 U.S. at 186, 55 S.Ct. 666, at 670 (emphasis added).[33] It is manifest from the legislative history that Congress was well aware of the Tracy Pumping Plant as part of the Central Valley Project, fully

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[33]Moreover, the First Deficiency Appropriation Act of 1946, ch. 589, 59 Stat. 632, 647-48 (1945), contained an appropriation "for construction of the . . . Delta division, Delta-Mendota canal, $7,500,000," and the Interior Department Appropriation Act of 1949, ch. 754, 62 Stat. 1112, 1129 (1948), contained a specific appropriation for the Tracy Pumping Plant Switchyard.

approved of it, and consistently encouraged its construction and operation.[34]

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[34]The Legislative history of congressional authorization of and appropriations for the Central Valley Project is fully covered in Engle, *Central Valley Project Documents*, H.R. Doc. No. 416, 84th Cong., 1st Sess., pt. 1 (1956), and H.R.Doc.No.246, 85th Cong., 1st Sess. (1957).

A 1946 House report stated that funds were to be provided for transmission lines to bring "power to the Delta area *where it will be required for the pumping of water for* irrigation and water supply purposes. The sum recommended would provide funds to begin construction of this line, extending from Oroville to Tracy." H.R.Rep.No.1288 on H.R.4805, 79th Cong., 1st Sess. (1946), *reprinted in* Engle, *supra*, pt. 2, at 21 (emphasis added). Again, in 1947, an appropriation was made for completion of the power transmission line, "which will ultimately be extended to Tracy to provide power for pumping water in the Delta area. . . ." *Id.*, *reprinted in* Engle, *Supra*, pt. 2, at 22-23. In 1949 the following statement appears in H.R.Rep.No.2038, 80th Cong., 2d Sess. (1948), *reprinted in* Engle, *supra*, pt. 2, at 27-28:

> The drought which large areas in California have experienced this past winter reemphasizes the necessity for expediting the construction of the irrigation facilities of the Central Valley project. To this end the committee has made liberal appropriations for storage and irrigation facilities. It has also provided all funds necessary to continue construction of the powerplants and switchyards at Shasta and Keswick Dams, the Oroville-Tracy transmission line and the switchyard at the Tracy pumps on the Delta-Mendota canal. . . . None of the funds in the bill and no funds heretofore provided for switchyards are to be used for the construction . . . of any switchyard facilities at Tracy not required for the operation of the project pumps. . . .

See Act of June 29, 1948, ch. 754, 62 Stat. 1112, 1128-29. The Senate report discussing the same bill stated:

> The committee recognizes that the Central Valley project has since its inception contemplated the construction of transmission lines done [sic] the West side of the Sacramento River as well as down the East side from Shasta Dam to the Tracy pumping plant, which lines are an integral part of this multiple-purpose project.

S.Rep.No.1609, 80th Cong., 2d Sess. (1948), *reprinted in* Engle, *supra*, pt. 2, at 28. In 1952 Commissioner of Reclamation Michael W. Straus testifed at Senate hearings on the Central Valley Project appropriations bill for that year:

> I want to report particularly on the Central Valley project of California *that this committee has protected and financed* since Reclamation was given the job of making California's half-century dream come true. . . .

(footnote continued on following page)

In 1960 Congress authorized the construction of the San Luis Unit of the Central Valley Project. Act of June 3, 1960, Pub.L. No.86-488, 74 Stat. 156. In section 4 of the Act Congress expressly noted the precise location and plans of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit Project.[35] There is no evidence whatsoever that Congress intended to authorize the San Luis Unit if,

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> The California Legislature has declared August 1 to August 10 a Central Valley Project Festival. The reason for these dates is that our multiple-Year, multiple-purpose job of completing the original authorized project is virtually complete. On August 1 water will be released from Shasta Dam, carried down the Sacramento River through Shasta and Keswick generators, through the cross-channel-canal cut, *lifted up 200 feet by the great Tracy pumps*, sloshed down the long Delta-Mendota Canal to the Mendota pool, where it will be exchanged for water trapped by Friant Dam in the San Joaquin River, and carried 158 miles down the Friant-Kern Canal to Bakersfield.
>
> That is an overall total movement of water 500 miles-the farthest that man has moved water anywhere at any time. *That is a culmination of the work this committee has supported over the years.*
>
> It will be a period of rejoicing the whole length of the California Valley. It is my hope that the members of this committee *who protected and nursed the project into being* can accept some of the multiple invitations I know they are going to receive to see *the attainment of the committee's objective.*

Engle, *supra*, pt. 2, at 37 (emphasis added). Further references to the Tracy Pumping Plant and specific appropriations therefor as an integral part of the Central Valley Project abound in the legislative history. *E. G., id.* at 21-28, 32-38, 40-44, 49, 50-51, 60, 65, 305.

[35]Section 4 of this Act provides, in pertinent part:

> If the Secretary proceeds to construct, operate, and maintain the San Luis Works under the terms of section 1 of this Act solely as a Federal project, the operation shall be subject to the following restriction: Whenever the chlorides in the water at the head of the Delta-Mendota Canal exceed one hundred and fifty parts per million during the months of July, August, or September, *the mean daily diversion from the Sacramento-San Joaquin Delta to San Luis unit via Tracy pumping plant and Delta-Mendota Canal* as measured at the San Luis pumping plant shall not exceed the mean daily import to the Sacramento Valley from the Trinity project.

Act of June 3, 1960, Pub.L.No.86-488, § 4, 74 Stat. 156, 159 (emphasis added).

and only if, the Corps of Engineers subsequently issued a section 10 permit on its own for either the construction or operation of the Tracy Plant. The District Court distinguished the 1960 Act on the ground that it was enacted after the commencement of the operation of the Tracy Plant, "and hence even if it were intended as Congressional consent, the original construction and operation of the Tracy Plant were unlawful." 400 F.Supp. at 637 n.41. We disagree. In *Wisconsin v. Duluth*, 96 U.S. 379, 24 L.Ed. 668 (1878), the Supreme Court upheld congressional authorization of a previously inaugurated private project on the basis of an appropriations act. The Court reasoned that it would unreasonably restrict Congress' power to hold that Congress could not retroactively approve previously unauthorized projects.

We are therefore constrained to hold that the statutes and legislative history sufficiently demonstrate congressional approval of the Tracy Pumping Plant and its operation, both at the initiation of the Central Valley Project and, retroactively, after the completion of the plant.[36]

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[36]After the first draft of a proposed Opinion in the present appeal was circulated for the consideration of Judges Trask and Tang, our court issued its decision in *Libby Rod and Gun Club v. Poteat*, 594 F.2d 742 (9th Cir. 1979). Initially, *Libby* was the cause of concern on the part of the author of this Opinion, especially in respect to our conclusion that Congress had impliedly authorized the Tracy Pumping Plant. Certain broad language in *Libby* appeared to declare that, henceforth, the affirmative congressional authorization specifically required by the Rivers and Harbors Act for obstructions to navigable capacity of waters could not be conferred by appropriations bills alone, however, specific such an appropriation act may have been toward a particular project it was funding. *See* 594 F.2d at 746, especially notes 5 and 6, and Judge Kennedy's dissenting opinion at 748-753. This concern, however, has been laid to rest by the concurring opinion of Judge Tang, who was one of the two judges constituting the majority in *Libby*. See pages 607 to 609, *infra*.

B. *Corps Authorization of the Delta Pumping Plant*

In the District Court the state appellants contended that various section 10 permits issued with respect to components of the Delta Pumping Plant constituted Corps authorization of the plant itself. Here, they limit their argument to Permit No. 4101, issued in June 1967, which authorized the construction of the Clifton Court Forebay. This forebay, a reservoir between the Delta and the pumping plant, was designed to allow the pumping to be confined to off-peak electrical hours. Its only function is to serve as an intake facility for the Delta Pumping Plant.

Plainly, the permit does not authorize the entire Delta Pumping Plant. No direct evidence in the permit file refers to the pumping plant, and the permit itself only authorized the State "to cut the westerly levee, of West Canal, at Clifton Court Tract for Clifton Court Forebay in Contra Costa County, California." Nor can we construe the permit as implicit authorization for the Delta Plant. The Corps regulations required that a permit application be complete and without reference to any unattached correspondence. 33 C.F.R. § 209.-130(b)(6) (1967). Maps and plans showing the location, extent, and character of the project were considered essential, and the proposed work was to be indicated in red ink. 33 C.F.R. §§ 209.130(c)(1), (c)(11) (1967). Given the completeness required of the application and the absence of any mention of the Delta Plant therein, we cannot appropriately say that the permit implicitly au-

thorized more than the approved application upon which it was based.[37]

The state appellants also contend that a Federal Power Commission (FPC) license for portions of the California Water Project eliminated the need for a section 10 permit. Had the FPC granted a license covering the Delta Pumping Plant, their position would have some support. *See Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162, 164-68 (S.D.N.Y.1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974). But the FPC did not license the Delta Pumping Plant. Instead, it expressly and specifically declined to "extend our jurisdiction beyond those facilities actually constructed

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[37]Even if it could be said that Permit No. 4101 initially authorized the operation of the Delta Pumping Plant, the Corps yet retains the power to impose conditions upon the continuing pumping operation. As the state appellants concede, paragraph (f) of Permit No. 4101 provides, in respect to the authorized activity, that "if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required . . . to remove or alter the structural work or obstructions caused thereby. . . ." Moreover, under the Corps' present regulations,

> [t]he District Engineer may reevaluate the circumstance and conditions of a permit either on his own motion or as a result of periodic progress inspection, and *initiate action to modify, suspend or revoke a permit as may be made necessary by consideration of the general public interest*. . . . Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with section 325.2, and not as modifications under this paragraph.

33 C.F.R. 325.7(a) (1978) (emphasis added). Thus, even if no further authorization is required to justify the continued existence of the Delta Pumping Plant because of the Corps' prior acquiescence in the plant's operations, the State is not relieved from section 10 permit requirements. Although the prior acquiescence by the Corps may establish a basis for estoppel against a Corps request to abolish the Delta Pumping Plant altogether, the operations of the plant remain subject to present regulations of the Corps. *See Sanitary Dist. v. United States*, 266 U.S. 405, 427-28, 45 S.Ct. 176, 69 L.Ed. 352 (1925); *cf. United States v. Sunset Coves, Inc.*, 514 F.2d 1089, 1090 (9th Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 125, 46 L.Ed.2d 94 (1975). Additionally, as we understand the above quoted Corps regulations, any significant increase in the pumping must have received Corps authorization.

for power purposes so as to include hundreds of miles of canals, pumping stations and other associated facilities unrelated to the production of power." Department of Water Resources of the State of California, 51 F.P.C. 529, 533 (1974).

The Corps of Engineers has promulgated regulations to govern situations in which its jurisdiction overlaps with that of the FPC. When a project is subject to FPC regulation, the Corps fulfills its duty of protecting navigable waters by recommending to the FPC the inclusion of appropriate provisions rather than by directly issuing a Corps permit; however, "as to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the FPC . . . the provisions of 33 U.S.C. § 401 *et seq.* remain fully applicable." 33 C.F.R. § 320.-3(f) (1978).

The FPC agrees that its license does not necessarily extend to all facilities of a project. In its opinion concerning the California Water Project, the FPC cautioned that "[t]he mere fact that various facilities are proposed for licensing by an applicant is not sufficient reason to assume that all such facilities are properly the subject of a license." The FPC also said, "[W]hen a particular facility is no longer part of the power project itself, it is not subject to our licensing jurisdiction." Department of Water Resources of the State of California, 51 F.P.C. 529, 533 (1974).

Thus, both the Corps and the FPC have said that the State should apply to the Corps for a permit for construction of a water transportation facility unrelated to power production. Their construction of the interrelationship between the Federal Power Act and the Rivers and Harbors Act is entitled to much deference, and we will follow it here. *See Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10, 95 S.Ct. 1066, 43 L.Ed 2d 279 (1975).

Although we reject the contentions of the state appellants as to the effect of Permit No. 4101 and the FPC license, it is conceivable that the State may still be excused from obtaining a permit for the operation of the Delta Pumping Plant. Present regulations of the Corps of Engineers contain a grandfather clause that dispenses with the need to obtain individual section 10 authorization for certain structures. The regulation provides, in pertinent part:

> The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits:
>
> * * * * * *
>
> (g) Structures or work completed before 18 December 1968 or in water-bodies over which the District Engineer has not asserted jurisdiction *provided* there is no interference with navigation.

33 C.F.R. § 332.4(g) (1978) (emphasis added).[38] The District Court found that

> [c]onstruction commenced on the Delta Pumping Plant . . . in July of 1963 and was sufficiently completed by late 1967 so that the Delta Plant could begin diverting Delta water at that time. It was not until February of 1969, however, that all construction was finished.

400 F.Supp. at 620-21.

Because the record on appeal does not reflect whether the pumping plant itself was completed prior to December 18, 1968, and the parties have not yet addressed the question, this question should first be considered by the District Court. At this time we express no opinion as to the validity of the Corps regulation. All such arguments should be presented in the first instance to the District Court. If the District

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[38]The superseded regulation, 33 C.F.R. 209.-120(g)(12)(vii) (1977), was similar.

Court finds that the Delta Pumping Plant was completed prior to December 18, 1968, the above regulation will exempt the State from obtaining an individual section 10 permit, provided that the facility does not interfere with navigation and so long as the regulation may be held to be a valid excercise of the Corps' authority.

VI. CONCLUSION

In summary, we hold that parties who suffer special injury have a private right of action to enforce compliance with the permit requirements of section 10. Sierra Club and the two individual appellees have standing to avail themselves this private right of action. We have already explained why, as to Friends of the Earth, the judgment was to be vacated and its complaint dismissed.

On the merits, the Tracy and Delta Pumping Plants fall within the ambit of section 10, since their operation has altered navigable waters of the United States. Because Congress affirmatively authorized the Tracy Pumping Plant, a Corps permit is not required for its present operational level. Therefore, we do not reach the question of whether an environmental impact statement is required for the Tracy Plant. The Delta Pumping Plant, which has not been authorized by Congress, must obtain a Corps permit for its operation, unless exempted by the Corps regulation, 33 C.F.R. § 322.4(g) (1978).[39] To the District Court, we ac-

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[39]We vacate the District Court order that the Secretary of the Army, or his delegate, prepare an environmental impact statement prior to issuing a section 10 permit for either pumping plant. *See* 400 F.Supp. at 651. An environmental impact statement is not required at the present time.

It is true that, under our decisions, an environmental impact statement may be required before the Corps can lawfully issue a permit for the Delta Pumping Plant, since federal approval — be it in the form of a permit, license, or otherwise — that allows a project to proceed constitutes "a major federal action" within the meaning of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1970). *Cady v. Morton*, 527 F.2d 786, 793 (9th Cir. 1975); *Scientists' Inst. for*

cord the discretion to allow the pumping to continue at its present level pending the filing and processing of the permit application. Traditional equitable principles apply. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 407-08, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); *Cady v. Morton*, 527 F.2d 786, 798 n.12 (9th Cir. 1975).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

TANG, Circuit Judge, concurring:

One important aspect of this case concerns congressional authorization of the Tracy Pumping Plant. Specifically, we have concluded that Congress intended to authorize the Tracy Plant, and that the district court was in error when it concluded that the consent of Congress had not been obtained for the Plant's construction.

Our conclusion that the Tracy Pumping Plant was authorized by Congress rests in part upon our review of relevant appropriations measures which, when viewed in light of the entire record, evidence clear congressional consent to the Plant's construction and operation as mandated by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

Public Information, Inc. v. Atomic Energy Comm'n, 156 U.S.App. D.C. 395, 404-405, 481 F.2d 1079, 1088-89 (D.C.Cir. 1973); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972). At this time, however, to order the preparation of an environmental impact statement for the Delta Pumping Plant would be premature. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Under Corps regulations, the District Engineer makes the initial determination of whether an alteration or modification of navigable waters will require an environmental impact statement. 33 C.F.R. § 325.4(b) (1978). We can see no justifiable reason, in this case, to depart from what we perceive to be an orderly procedure. Not until the Corps has made its decision should a party in a case such as this seek relief in the courts.

There may be some question that our holding in this case might conflict with this court's recent decision in *Libby Rod and Gun Club v. Poteat*, 594 F.2d 742 (9th Cir. 1979). As a member of the majority in *Libby*, it is important to point out distinguishing differences between this case and *Libby*.

I

Authorizing Legislation

A review of the relevant authorizing legislation addressing the Tracy Pumping Plant and the Libby Dam Project highlights the distinction between the two cases.

On appeal from the district court's ruling that a reregulating dam had not been authorized as required under 33 U.S.C. § 401, the Army Corps of Engineers (Corps) argued in *Libby* that the Flood Control Act of 1950 authorized both the main Libby Dam and a reregulating dam. Upon examination of the Flood Control Act, the court concluded that the sole reference to reregulation was contained in ¶ 165 of H.R. Doc.No. 521, 81st Cong., 2d Sess. (1950) which had been incorporated in the Act. That paragraph, the court held, did not explicitly authorize a reregulating dam — to the contrary, it noted that reregulation would be considered "when the need arises." *Libby Rod and Gun Club v. Poteat*, 594 F.2d at 744. The court further concluded that this lone reference to reregulation could not be construed to authorize implicitly a reregulating dam, because: (1) it was not clear when the Flood Control Act was passed that a reregulating dam was necessary for the effective functioning of the main Libby Dam, and the Corps had cited no authority to support the proposition that a dam could be deemed authorized by necessity under 33 U.S.C. § 401; and (2) to imply authorization would frustrate the intent of Congress, evidenced in ¶ 165, to examine reregulation "when the need arises." Therefore, the court was not con-

vinced that Congress intended to authorize a reregulating dam in the Flood Control Act.

The authorizing legislation in the instant appeal paints a different picture of congressional intent.

First, the Rivers and Harbors Act of 1937, ch. 832 § 2, 50 Stat. 844, reauthorized the entire Central Valley Project. (Opinion at 602.) In that authorization, Congress explicitly authorized, *inter alia*, pumping stations necessary to the effective functioning of that project. Rivers and Harbors Act of 1937, 50 Stat. at 850; (Opinion at 602 n.31.) Unlike *Libby* therefore the original authorizing legislation recognized the possible need for pumping stations and seemingly *authorized their construction* if they became necessary to the functioning of the entire project.

Second, the Reclamation Project Act of 1939, 43 U.S.C. § 485h(a), deemed as authorized any reclamation project that the Secretary of Interior found to be feasible, and that the Secretary had submitted a favorable report upon to the President and Congress. (Opinion at 603.) In 1947 the Secretary forwarded to the President and Congress a favorable feasibility report of the Central Valley Project, which contained a detailed analysis of the Delta-Mendota Canal, one aspect of which is the Tracy Pumping Plant. (Opinion at 603.)

Unlike the Flood Control Act in *Libby*, the Reclamation Project Act was general legislation that allowed the Secretary of Interior to approve a project and the elements thereof, and such approval by the Secretary was deemed to represent authorization of the project.

Third, the Act of June 3, 1960, Publ.L.No. 86-488, 74 Stat. 156, authorized the construction of the San Luis Unit of the Central Valley Project. (Opinion at 29.) In that legislation, Congress explicitly "noted the precise location and

plans of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit project." (Opinion at 604-605.)

The importance of these three facts cannot be underestimated. First, Congress recognized the necessity of pumping plants in the Rivers and Harbors Act; second, it granted the Secretary of the Interior broad authority to authorize reclamation projects; and third, other authorization legislation specifically referred to the Tracy Pumping Plant. When these facts are examined in light of subsequent appropriations, a result different from *Libby* is mandated.

II

Appropriations

In *Libby*, this court was confronted by conflicting legal arguments. The Corps contended that appropriations measures should be equated automatically with project authorization. The Rod and Gun Club conversely argued under *T.V.A. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) that appropriations could never be equated with authorization.

This court adopted a middle view, concluding that appropriations should not be regarded as measures that either automatically authorized, or failed to authorize, a given project. This view was based in part on *T.V.A. v. Hill*, where the Court held that appropriation bills and substantive enactments of Congress were distinguishable:

> We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs.

Id. at 190, 98 S.Ct. at 2299-2300.

Importantly, the panel in *Libby* did *not* hold that *T.V.A. v. Hill* mandated that appropriations could never be regarded as representing authorization. Rather, *Libby* merely rec-

ognized that an analysis of legislative history was required before a conclusion could be made as to the effect of a given appropriations measure.[1] Although *T.V.A. v. Hill* was certainly a distinguishable case on numerous grounds, its direct recognition of the difference between appropriations measures and substantive enactments transcends the facts of that case. This point alone was relied upon in *Libby*.

The *Libby* court then proceeded to examine the facts of the case, and held that the appropriations for the reregulating dam could not be regarded as authorization. This conclusion was based on a combination of two factors: (1) the authorizing legislation not only failed to indicate that a reregulating dam was contemplated as part of the Libby Dam project, but suggested as well that an analysis of the need for a second dam would be undertaken if the need for such a dam arose; and (2) there was strong evidence in the record that the Corps had misled appropriations committees by asserting to committee members that the reregulating dam had been specifically authorized by the Flood Control Act. *Libby*, 594 F.2d at 746. Confronted with such a legislative background, the court was reluctant to hold that the appropriations represented the will of Congress and could thus be equated with the consent required under § 401.

The facts here in *Sierra Club* are decidedly different. First, the Rivers and Harbors Act of 1937 recognized that pumping stations might be necessary to the effective functioning of the Central Valley Project, and thus implicitly

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[1] 1. *Libby* did recognize, however, that appropriations measures and the committee reports accompanying such measures are to be scrutinized closely when it is argued that such measures represent substantive authorization. This view arises from both *T.V.A. v. Hill* and *SEC v. Sloan*, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978), where the Court has suggested that isolated remarks in committee reports and hearings are not to be regarded as necessarily representing the will of Congress as a whole.

authorized such stations. *See Pigeon River Co. v. Cox*, 291 U.S. 138, 159-60, 54 S.Ct. 361, 78 L.Ed. 695 (1934). The funding of what Congress recognized as possible necessary aspects of a project creates a situation different than that existing in *Libby*, and the appropriations, when viewed in light of this original authorizing legislation, can be reasonably regarded as authorizing the Tracy Pumping Plant by implication.

Second, the Secretary of the Interior was given general authority to authorize specific projects under the Reclamation Project Act of 1939. When the Secretary found the Central Valley Project feasible and submitted a favorable report to Congress, specific appropriations for the pumping station take on a significance not found in *Libby*. Indeed, these facts place *Sierra Club* directly under this court's rulings in *United States v. Kennedy*, 278 F.2d 121, 122 (9th Cir. 1960) and *Polson Logging Co. v. United States*, 160 F.2d 712, 714 (9th Cir. 1947). In these cases, the court determined that when a government official had been given general authority to condemn land for public uses, appropriations for specific parcels could be regarded as congressional authorization to acquire that land. The facts of *Sierra Club* seem highly analogous, because the Secretary was given general authority to authorize reclamation projects. Thus, appropriations for the Tracy plant can be regarded under *Kennedy* as authorization.

Third, the recognition of the Tracy Pumping Plant in the authorizing legislation for the San Luis Unit creates a strong inference that Congress believed it had authorized the Tracy Pumping Plant, and again appropriations, when viewed in light of this fact, can reasonably be regarded as supporting the conclusion that the pumping plant had been authorized. In *Libby*, the Corps argued similarly that the Water Resources Development Act implicitly recognized the exist-

ence of the reregulating dam, because the Act authorized generators for the reregulating dam. This claim was rejected, because the Water Resources Development Act authorized design studies only. However, the *Libby* court did note that had generators been authorized for the reregulating dam, a strong inference would have arisen that Congress intended to authorize the necessary structure in which the generators were to be placed, *i.e.*, the reregulating dam.

The recognition in the San Luis Unit authorization of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit project creates the "strong inference" of intent to authorize that which was lacking in *Libby*. This inference, combined with specific appropriations for the Tracy Pumping Plant, satisfies me that Congress has consented tc the construction and operation of the Tracy Pumping Plant.

A final point should be made. Both the majority in this case and Judge Kennedy in his dissent in *Libby* rely heavily upon *United States v. Arizona*, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935) and *Wisconsin v. Duluth*, 96 U.S. 379, 24 L.Ed. 668 (1877) for the proposition that appropriations should be equated with authorization.

I do not read either *United States v. Arizona or Wisconsin v. Duluth* as necessarily controlling. Both cases predate *T.V.A. v. Hill*, and to read either case as representing a decision by the Court that appropriations measures automatically represent authorization for purposes of the Rivers and Harbors Act of 1899 is suspect in light of that decision. However, the dictum in *United States v. Arizona* did suggest that Congress had appropriated money for a certain Laguna Dam Project "and so recognized and approved the building of the dam." *United States v. Arizona*, 295 U.S. at 186, 55 S.Ct. at 670.

It would appear unwise to me to read this dictum overly broadly. The facts in *Arizona* do not make clear the exact specifics of the Laguna Dam Project, and the Court might have been persuaded by any number of factors to conclude that the appropriations represented authorization. Because none of these factors are directly addressed in the Court's decision, the *Libby* majority thought it reasonable to distinguish the dictum and rely instead on an independent analysis of the facts of the *Libby* case.

In review, the facts of *Libby* and *Sierra Club* are distinguishable. *Libby* held that appropriations were to be analyzed closely in light of the facts of a given case. When the facts of *Sierra Club* are so analyzed, we have concluded that appropriations, when combined with the original legislation relating to the Tracy Pumping Plant, represent the consent of Congress mandated by 33 U.S.C. § 403.

APPENDIX 3.

[400 F.Supp. 610].

SIERRA CLUB, a non-profit California Corporation, *et al.*, Plaintiffs, v. Rogers C. B. MORTON, as Secretary of the Interior of the United States, *et al.*, Defendants. No. C-71-500-CBR. United States District Court, N.D. California. July 28, 1975.

John B. Clark, Pettit, Evers & Martin, San Francisco, Cal., for plaintiffs Sierra Club, Friends of the Earth and Hank Schramm.

Michael R. Sherwood, San Francisco, Cal., Sierra Club Legal Defense Fund, for plaintiff Sierra Club.

Gary J. Near, San Francisco, Cal., for plaintiffs Friends of the Earth and William Dixon.

James L. Browning, Jr., U. S. Atty., Francis Boone, Richard J. Dauber, Asst. U. S. Attys., San Francisco, Cal., for federal defendants.

Evelle J. Younger, Atty. Gen., Carl Boronkay, R. H. Connett, Bertram G. Buzzini, Deputy Attys. Gen., Sacramento, Cal., for state defendants.

Victor E. Gleason, Los Angeles, Cal., for intervening defendant Metropolitan Water District of Southern California.

James G. McCain, Corcoran, Cal., for intervening defendant Tulare Lake Basin Storage District.

Albert Thomas Henley, San Jose, Cal., and Daniel F. Gallery, Sacramento, Cal. for intervening defendant Santa Clara Water District.

MEMORANDUM OF OPINION

RENFREW, District Judge.

In 1971 two environmental groups and two individuals brought this action to contest the allegedly unlawful con-

struction and operation of three major facilities of the California Water Project. The parties agreed to bifurcate the trial of the action into a liability phase and a relief phase. The liability phase was tried to the Court between June 10, 1974, and June 21, 1974. Subsequently, on July 26, 1974, the Court heard oral argument and at the conclusion of that argument informed the parties of its views as are more fully set forth herein.

The California Water Project has been constructed in part as a response to California's water problem. The essence of that problem is the need to redistribute the state's plentiful water supply from water-abundant areas to water-deficient areas. The water-rich areas lie in the North and West Central portion of the state. Water from these areas flows through a system of rivers and channels to the Sacramento-San Joaquin Delta ("Delta") and finally through the San Francisco Bay to the Pacific Ocean. One proposed solution to the state's water problem is transporting the excess water, which would normally flow into the ocean, to the arid or semi-arid areas of the state. A second and interrelated problem arises because the excess water is present in and flows out of the water-rich areas only during certain times of the year. Because the demand for water consumption for human use is relatively constant throughout the year and the agricultural demand varies during different times of the year, water which accumulates in the water-rich areas during the excess water seasons must be stored for use during the year if these demands are to be met.

A brief description of the geographical area underlying the subject matter of this suit will aid in understanding the facts of this case. The Delta is a roughly triangular-shaped region which runs southwest from Sacramento west of the Sacramento River to Antioch, which forms one corner of the triangle. It then runs southeast from Antioch to a point

approximately 10½ miles southeast of Tracy, which forms a second corner. Finally, it runs north from that point through Stockton to Sacramento, completing the triangle. Clifton Court Forebay, Delta Pumping Plant, and Tracy Pumping Plant are located on the edge of the Delta approximately half-way between Antioch and Tracy. The proposed route of the Peripheral Canal runs from the intake structure in the north Delta, south through the east Delta, and finally turns to the southwest, stopping between the Tracy Pumping Plant and the Clifton Court Forebay. In the southern Delta the San Joaquin River and its tributaries flow basically in a northwesterly direction while in the northern Delta the Sacramento River and its tributaries flow in a southwesterly direction.[1]

The California Water Project consists of both state and federal facilities. The federal component of the project is administered by the United States Bureau of Reclamation and is designated as the Central Valley Project. The state component of the project is administered by the Department of Water Resources, a department within the Resources Agency of the State of California, and is designated as the State Water Project.

The Central Valley Project, the federal project, consists of a series of reservoirs, pumping plants, canals, and other facilities designed to control the flow of water in the Sacramento River, San Joaquin River, and certain of their tributaries, generate hydroelectric power, provide flood control, and provide water for irrigation and other uses in the Central Valley of California. One of the principal facilities of the Central Valley Project is the Tracy Pumping Plant, located on an inlet channel of Old River in the Delta. The Tracy

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[1]See the map of the Delta attached hereto as Exhibit A.

Pumping Plant diverts water from the Delta by pumping it into the Delta-Mendota Canal, a 115-mile canal which leads to the Mendota Pool in the Central Valley.

The State Water Project, created by the Burns-Porter Act of 1959, was to consist of a system of dams, canals, pumping plants, and other facilities designed to transfer water across the Delta, provide for water conservation and flood and salinity control in the Delta, provide for the generation of power, and provide transfer water from points at or near the Delta to the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. The Burns-Porter Act was submitted to and approved by California voters on November 8, 1960.

Substantially all of the water required annually by the State Water Project is to be obtained initially from the Sacramento and San Joaquin Rivers and their tributaries. Among the facilities constructed for this purpose are the Delta Pumping Plant and the Clifton Court Forebay which are located on the edge of the Delta. A majority of the water that is transported from Northern California to Southern and Central California travels through the Delta Pumping Plant and the California Aqueduct.

The State of California through its Department of Water Resources has entered into contracts providing that at some point in the future it deliver 4.23 million acre-feet of water annually by means of the State Water Project. The primary purchasers of water are the Kern County Water Agency, which has agreed to purchase 1,153,400 acre-feet annually, and the Metropolitan Water District of Southern California, which has agreed to purchase 2,011,500 acre-feet annually. It is expected that over 95% of the water which the State is contractually obligated to deliver to Central and Southern California will be transmitted through the Delta Pumping Plant.

Many controversies have been associated with the continuing development of this massive water project. This case, however, concerns the extent to which the decisions and actions of state and federal defendants must take into account navigational, environmental, fish, and wildlife considerations. The Delta, consisting of approximately 700 miles of meandering waterways, some of which are navigable, is used for both commercial shipping and recreational boating. Water skiing and houseboating are common activities in this region and there are many marinas within its confines. A significant amount of California warm water fishing, anadromous sport fishing, and approximately 80% of the commercial salmon fishing is dependent upon the environment in the Delta. Moreover, this region and its adjoining marshlands and wetlands are on the Pacific Flyway, an important wintering area and major and customary natural habitat for migratory waterfowl.

Plaintiffs in this case are The Sierra Club, Friends of the Earth, Hank Schramm, and William Dixon. The Sierra Club is a nonprofit California corporation having in excess of 130,000 members of whom more than 40,000 live in the San Francisco Bay and the Sacramento-San Joaquin Delta areas. Included in the membership of the Sierra Club are many persons who use the waters referred to in the complaint for recreational purposes, including, but not limited to, boating, fishing and swimming. The stated purposes of the Sierra Club include the preservation and conservation of the natural resources, fish and wildlife of the United States, including its rivers, bays, wetlands, deltas, and estuarine areas.

Friends of the Earth is a nonprofit New York corporation which has its principal place of business in San Francisco. Its stated purposes include the preservation, restoration, and rational use of the environment.

Hank Schramm is and has been engaged for the past 20 years in the business of commercial fishing and the operation of sports fishing party boats in the San Francisco Bay and the Pacific Ocean. Schramm has a economic interest in this controversy since he depends for his livelihood on the maintenance, preservation, and conservation of sports and commercial fisheries in the San Francisco Bay and the adjoining waters of the Pacific Ocean.

William Dixon owns substantial property in the Delta, including a partnership interest in the St. Germain Duck Club on Simmons Island, and consequently has an economic interest in the maintenance, preservation, and conservation of adequate non-polluted supplies of water in the Delta and San Francisco Bay regions.

Defendants are state and federal officials who administer the various agencies responsible for overseeing the operation, construction, and regulation of the facilities in question. The federal defendants are Rogers C.B. Morton, Secretary of the Interior; Gilbert Stamm, Commissioner of the Bureau of Reclamation; Howard H. Calloway, Secretary of the Army; William C. Gribble, Jr., Chief of Engineers of the United States Army; George B. Fink, Division Engineer of the South Pacific Division of the United States Army Corps of Engineers; Colonel Frederick J. Rockwell, District Engineer of the Sacramento, California District of the United States Army Corps of Engineers; and Colonel James L. Lammie, District Engineer for the San Francisco, California District of the United States Army Corps of Engineers. The state defendants are Norman B. Livermore, Jr., Secretary for Resources, and John R. Teerink, Director of the Department of Water Resources.[2]

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[2]For the purposes of this Memorandum of Opinion, defendants are named as they appeared in the Agreed Pre-Trial Order. The Court notes that all of the named defendants were sued in their official capacities and thus, even though some of those originally named no longer occupy those positions, by virtue of Rule 25(d)(1) of the Federal Rules of Civil Procedure their successors are deemed automatically substituted.

Plaintiffs' amended complaint alleged six claims for relief, namely, failure of defendants to comply with Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403 (first claim); Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (second claim); Sections 2 and 3 of the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 662, 663 (third claim); Sections 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331, 4332 (fourth claim); the Estuarine Areas Act and the Federal Water Pollution Control Act, 16 U.S.C. § 1221 *et seq.* and 33 U.S.C. § 1151 et seq. (fifth claim); and the California Environmental Quality Act, California Public Resources Code § 21000 *et seq.* (sixth claim). In the pretrial order plaintiffs abandoned their second claim. Since the parties have at best cursorily asserted and argued with respect to the fifth claim, and since plaintiffs have offered neither findings nor conclusions with respect to that claim and none of the trial testimony or exhibits were directed toward that claim, the Court considers the fifth claim to have been abandoned at trial and does not discuss it in this Memorandum of Opinion.

The heart of this phase of the controversy is the legality and operation of the Tracy and Delta Pumping Plants and the proposed construction and operation of the Peripheral Canal.

I. FACTUAL BACKGROUND

A. *The Tracy Pumping Plant*

Construction began on the Tracy Pumping Plant ("Tracy Plant") in 1947 and was sufficiently completed by June 11, 1951, so that the facility could commence initial operation. The Tracy Plant was built by the Bureau of Reclamation at a point approximately two miles from the Old River and one mile south of the Clifton Court Tract. While the Tracy

Plant was being constructed, an intake channel was simultaneously constructed from the pumping plant northeast to Old River. The Tracy Plant consists of six pumps with a maximum pumping capacity of 4602 cubic feet per second ("cfs") which lift the water supplied through the intake channel into the Delta-Mendota Canal. The Delta-Mendota Canal is the conduit through which federal water is transported to the Central Valley.

B. The Delta Pumping Plant

Construction commenced on the Delta Pumping Plant (" Delta Plant") in July of 1963 and was sufficiently completed by late 1967 so that the Delta Plant could begin diverting Delta water at that time. It was not until February of 1968, however, that all construction was finished. The Delta Plant is approximately two miles southwest of the end of Italian Slough, an inlet off Old River. Originally water exported by the Delta Plant was transported through an intake channel connecting the Delta Plant with Italian Slough. The construction of this intake channel required the State to cut through the levee of the slough. The Delta Plant presently has seven pumping units with a combined capacity of 6300 cfs[3] which lift Delta water into the California Aqueduct. However, there is room for the installation of four additional pumping units which would increase capacity to 10,300 cfs,[4] and it is contemplated that at least the first of these pumps will be operational by 1980.

In order to obtain the ability to confine pumping to off-peak electrical hours, the State acquired the Clifton Court Tract and in December of 1967 commenced construction

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[3]Stated in other terms, the Delta Plant currently has the capacity to pump 12,600 acre-feet of water per day.

[4]If a pumping plant pumps at the rate of 1 cfs for 24 hours, it will pump 1.98 acre-feet per day.

of the facility which is an artificial body of water known as Clifton Court Forebay. Construction of this Forebay involved the excavation of land and the building of dikes or levees inside the existing levees which shielded Clifton Court Tract from Italian Slough, West Canal, and Old River. When the Forebay became operational in November of 1969, the end of the Italian Slough intake channel was closed, and the remainder of the channel was connected to the Forebay, thus creating the intake channel for the Delta Plant. The Forebay diverts water from the Delta through an intake structure consisting of five radial gates which connects the Forebay to West Canal. West Canal in turn is connected to Old River.

C. *The Peripheral Canal*

The State of California proposes to finance, construct, and operate a 42-mile canal, known as the Peripheral Canal, from a point near Hood, California, on the Sacramento River to a point near the headworks of Clifton Court Forebay and the intake channel for the Tracy Plant. The Peripheral Canal is designed to permit the State to transport high quality fresh water to the Delta and Tracy Plants by diverting water from a point on the Sacramento River upstream from both the point of salt water intrusion and the point where poorer quality water from the San Joaquin River joins the Sacramento River in order to insure that saline or poorer quality water from the Delta does not enter the pumps of the Delta or Tracy Plants. The Peripheral Canal is designed to provide sufficient quantities of water to the Delta and Tracy Plants so as to satisfy the present and future requirements of the California Water Project, to provide water quality control, and to improve fish and wildlife and recreation potentials in the Delta.

As presently proposed, the Peripheral Canal will be 30 feet deep, have a base width of approximately 200 feet, have a top width of between 400 and 500 feet, and have an anticipated capacity of approximately 23,000 cfs. This maximum capacity would be allocated in the following manner: 10,300 cfs would be allocated to the State Water Project facilities served by the Delta Plant, 6,500 cfs would be available to the Federal Central Valley Project,[5] and 6,000 cfs would be available for release into the Delta along the path of the Peripheral Canal. Although one witness estimated that the entire Peripheral Canal project would cost $240 million, inflationary forces could easily result in a much higher cost.

II. RIVERS AND HARBORS ACT OF 1899

A. *Private Right of Action*

In determining whether a private right of action is implicit in a statute not expressly providing one, four factors are relevant: (1) Is the plaintiff one of the class for whose especial benefit the statute was enacted; (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L. Ed.2d 26 (1975). *See Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975); *National Railroad Passenger Corp. v. National Ass'n of*

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[5]It is not clear from the testimony how much of this figure would be available for pumping through the Tracy Plant.

Railroad Passengers, 414 U.S. 453, 457-458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (hereafter *Amtrak*). *But cf. Stewart v. Travelers Corp.*, 503 F.2d 108, 110-111 n. 7 (9th Cir. 1974). Private rights of action are based on a public policy of allowing injured parties to obtain civil redress for injuries resulting from the violation of statutorily imposed duties where the maintenance of such actions would effectuate the purposes intended to be served by the Act and would not interfere with the operation of the statutory scheme. While the courts that have considered the issue have expressed diverse views,[6] the Court of Appeals in this Circuit has held *sub silentio* that a private right of action exists under Sections 9 and 10. *Alameda Conservation Association v. California*, 437 F.2d 1087, 1094-1095 (9th Cir. 1971) *Sierra*

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[6]The Court of Appeals for the Third Circuit has held that governmental enforcement is exclusive and that Congress did not create any civil cause of action in favor of private parties injured by any violation of the Act. *Red Star Towing and Transportation Co. v. Department of Transportation*, 423 F.2d 104, 106 (3d Cir. 1970). *See Hooper v. United States*, 331 F.Supp. 1056, 1058 (D.Conn. 1971). *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140, 1148 (N.D.Ala.1971), *aff'd.*, 456 F.2d 1294 (5th Cir. 1972), merely holds that although Section 13 of the Rivers and Harbors Act may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even from deposits in violation of Section 13, does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction. The crux of that decision was the court's belief that Section 13 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water pollution that have traditionally been dealt with under the law of nuisance. *Ibid.*, at 1145. There the court simply did not find the plaintiffs within the class of persons for whose benefit the statute was enacted. *Bass Anglers Sportsman's Society v. Scholze Tannery, Inc.*, 329 F.Supp. 339, 348-349 (E.D.Tenn.1971), and *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F.Supp. 412, 416 (N.D., M.D. and S.D.Ala.), *aff'd.*, *sub nom. Bass Anglers Sportsman Society v. Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971), at best hold that no private right of action exists under Section 13 to redress public injuries. In fact, the Fifth Circuit has held that there exists a private right of action to redress specific injuries. *Neches Canal Co. v. Miller & Vidor Lumber Co.*, 24 F.2d 763, 765 (5th Cir. 1928).

Club v. Leslie Salt Co., 354 F.Supp. 1099, 1104-1105 (N.D.Cal.1972). In *Alameda Conservation* plaintiffs sought injunctive relief against defendant corporation alleging injury arising out of defendant's violation of Sections 9 and 10. The court, after concluding that all of the individual plaintiffs (but not the association) had standing to sue, reversed the district court's dismissal. Although the court did not explicitly discuss the question of whether a private right of action existed, it would not have reversed the district court's dismissal of the action unless it had so ruled *sub silentio*.[7] Moreover, in *Cort v. Ash*, *supra*, 95 S.Ct. 2080, the Supreme Court apparently construed *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201-202, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), as recognizing the existence of a private right of action under the Rivers and Harbors Act of 1899, albeit under a different section of the Act. Finally, analysis of the Rivers and Harbors Act of 1899 in light of *Cort v. Ash* also leads the Court to conclude that a private right of action exists under Sections 9 and 10.

First, the Court concludes that plaintiffs are members of the class for whose especial benefit the statute was enacted. Sections 9 and 10 were enacted both to prevent injuries to private parties as a result of obstructions to navigable capacity which were not authorized by the United States and to allow the United States to regulate obstructions to the navigable capacity of its navigable waterways.[8]

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[7]Standing concerns whether a particular plaintiff is sufficiently connected with a cause of action to assert rights thereunder in a legal proceeding. Clearly, before a court can rule on the question of standing, there must be a determination that a private right of action exists. See *Amtrak*, *supra*, 414 U.S. at 456, 94 S.Ct. 690.

[8]Prior to its enactment the Supreme Court in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8, 8 S.Ct. 811, 31 L.Ed. 629 (1888), held that there was no common law of the United States which prohibited obstructions and nuisances in navigable rivers. In that case a *private*

Second, the Court concludes that there is no indication that it was the intent of Congress to preclude a private right of action.[9] In reaching this conclusion, the primary consideration is the signficance of the provisions empowering the the Attorney General to enforce the Act in appropriate proceedings. Preliminarily, the Court notes that the doctrine of *expressio unius est exclusio alterius*, recently given vitality in two United States Supreme Court decisions, has been held to be inapplicable to the Rivers and Harbors Act of 1899. *Wyandotte Transportation Co. v. United States*, *supra*, 389 U.S. at 200-204, 888 S.Ct. 379.[10] That being so, the only question is whether there is anything in the Act or the statutory scheme which indicates that Congress intended to vest exclusively in the Attorney General the en-

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party had obtained an injunction against the construction of a bridge over the Willamette River. Because the Court found that there was no federal common law prohibiting such a bridge and that the act admitting Oregon into the Union also did not prohibit such a bridge, it reversed the decision of the trial court and ordered the suit dismissed. It was in response to this case that Congress enacted the Rivers and Harbors Act. This Court believes this is clear evidence that the Rivers and Harbors Act was enacted to benefit those persons who are specifically injured by an unlawful obstruction to navigable capacity.

[9]The Court notes that it has not found and the parties have not cited any authorities which indicate a congressional intent to create a private right of action, with the exception of the above analysis of *Willamette Iron Bridge Co. v. Hatch*.

[10]In *Barbour* and *Amtrak* the court adopted the proposition that express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the legislature. *Securities Investor Protection Corp. v. Barbour*, *supra*, 95 S.Ct. 1733; *Amtrak*, *supra*, 414 U.S. at 458, 94 S.Ct. 690. The court further stated that that implication would yield, however, to clear contrary evidence of legislative intent as found in the legislative history and in the overall structure of the Act. This principle is no barrier in the instant case in view of the holding of the Supreme Court that the remedies specified in the Rivers and Harbors Act of 1899 are not exclusive. *See Wyandotte Transportation Co. v. United States*, *supra*, 389 U.S. at 200-201, 88 S.Ct. 379. In that case the court recognized that to limit the government to remedies explicitly authorized under the Act would withhold remedies that would ensure the effectiveness of the Act. The court was not prepared to impute to Congress a futility inconsistent with the great design of the legislation.

forcement of the Act. Section 12, 33 U.S.C. § 406, makes violations of Sections 9 and 10 a misdemeanor punishable by fine or imprisonment and further provides that:

> "* * * the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

This section grants jurisdiction to the district court to enforce by injunction removal of structures erected in violation of Sections 9 and 10. It further grants power to the Attorney General to institute such injunctive proceedings. Neither of these grants rise to the level of an express prohibition against private suits. Moreover, the first jurisdictional grant would seem to encompass all injunctive suits, both private and governmental. In a case involving a somewhat analogous statutory scheme, the United States Supreme Court held that a provision for enforcement by the Attorney General did not preclude a private right of action. See *Allen v. State Board of Elections*, 393 U.S. 544, 554-557, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).[11] In view of that case and because the

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[11]In *Allen v. State Board of Elections*, a similar statute was before the court. There 42 U.S.C. § 1973j(f) provided that the district courts would have jurisdiction over proceedings brought pursuant to that section of the Voting Rights Act of 1965. Another subsection of that same section of the statute provided that the Attorney General may bring actions for preventive relief whenever any person engaged in acts prohibited by certain sections of the Voting Rights Act. 42 U.S.C. § 1973j(d). Nothwithstanding this explicit grant of power to the Attorney General, the court found that enforcement of the Voting Rights Act was not vested exclusively in him and held that a private right of action existed under Section 5 of the Voting Rights Act. In the instant case these two grants of power (*i.e.*, jurisdiction in the district court and power to enforce on the part of the Attorney General) are found in two separate clauses in one sentence rather than in two separate subsections of a statutory provision as in *Allen*.

Court believes that a private right of action is necessary to effectuate the purposes intented to be served by the Act, the Court cannot find, either expressly or impliedly, in Section 12 of the Rivers and Harbors Act any exclusive vestment of enforcement powers in the Attorney General. The Court does note that Section 17 provides, *inter alia*, that the Department of Justice "shall conduct the legal proceedings necessary to enforce" Sections 9 and 10.[12] In light of the language of that entire section, however, the Court believes that Section 17 merely creates a duty of enforcement in the Justice Department and vests exclusive enforcement of the criminal provisions in that department. Accordingly, the

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[12]Section 17 provides:

> "The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States Attorneys to report to the Attorney General of the United States the action taken by him against such offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States." 33 U.S.C. § 413.

Court concludes that nothing in the Act precludes private suits to redress injury to private persons due to violations of the Act.[13]

Third, the Court concludes that allowance of a private right of action where a plaintiff alleges he has been specifically injured by a violation of Sections 9 and 10 is necessary to effectuate the purposes intended to be served by the Rivers and Harbors Act of 1899 and hence is consistent with the underlying purposes of the legislative scheme. Although the Attorney General can bring civil suits to redress such injuries, he has neither the time, staff, nor incentive to see that all injuries caused by violations of the Act are redressed. As in *Allen v. State Board of Elections, supra*, 393 U.S. 544, 89 S.Ct. 817, implication of a private right of action is necessary or the Rivers and Harbors Act of 1899 will become practically unenforceable against specific injuries to private parties. Accordingly, the Court concludes that implication of a private right of action under Sections 9 and 10 would be consistent with the broad purposes of the Act.[14]

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[13]The Court agrees that Congress intended to vest exclusive enforcement in the Attorney General of suits to redress public injuries due to violations of the Act. In the case of public injuries, Congress may have felt that no citizen should substitute his judgment for that of the government as to when the public interest required civil relief.

[14]The instant case is unlike *Barbour* where Congress created a corporate entity to solve a public problem and then provided for substantial supervision of its operations by an agency charged with the protection of the public interest (*i.e.*, the S.E.C.). It is also unlike *Amtrak* where the legislative intent and the statute itself clearly indicated that Congress was conferring a private right of action only on a limited class of private parties (*i.e.*, employees who were the beneficiaries of certain labor agreements). Additionally, by allowing a private action in *Wisconsin v. Illinois*, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929), albeit by a state, the Supreme Court has at least *sub silentio* recognized the existence of a private right of action under Section 10.

Finally, although it might be remotely possible[15] for the plaintiffs to bring a common law nuisance suit in state court against the defendants, the Court concludes the instant case is not the type of action which is traditionally relegated to state law in an area basically the concern of the states. There is a federal interest in protecting persons from injuries resulting from unauthorized obstructions to the navigable capacity of navigable waters of the United States and possible federal intrusion into the area of state nuisance law is necessary so that the federal interest asserted here will not be compromised by contrary state law. *Cort v. Ash* is distinguishable as in that case the interest which plaintiff sought to vindicate (*i.e.*, breach of fiduciary duty by corporate directors arising out of an *ulta vires* expenditure of corporate funds) was not the federal interest (*i.e.*, dulling the impact of corporations on federal elections) which Congress had intended to protect when it enacted the Federal Election Campaign Act. *Cort v. Ash, supra*, 95 S.Ct. 2080. Accordingly, the Court concludes that the test established in *Cort v. Ash* requires the finding of a private right of action

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[15]It is not at all clear to the Court that a common law nuisance suit to redress the type of injuries alleged by plaintiffs in the instant case would be cognizable in state court. Traditionally suits of this nature could only be brought to redress injuries to property interests and hence the availability of a common law nuisance suit may be severely restricted in many cases. W. Prosser, *The Law of Torts*, §89 (4th Ed. 1971). Although California appears to have adopted a more liberal rule, *e.g.*, 36 Cal.Jur.2d. *Nuisances* § 30 (1957), which might conceivedly cover the instant factual situation, the Court need not determine the scope of California nuisance law, as the key factor here is that any possible federal intrusion in to the area of state nuisance law is necessary and proper to vindicate plaintiff's federal rights.

under Sections 9 and 10 of the Rivers and Harbors Act of 1899.[16]

B. *The Merits of the Claim*

Plaintiffs' first claim is that the construction and present operation of the Tracy and Delta Plants and the proposed construction of the Peripheral Canal, in the absence of the proper authorization, are in violation of Sections 9 and 10 of the Rivers and Harbors Act of 1899. 33 U.S.C. §§ 401, 403. The Court must determine whether the construction and operation of any of the three structures requires authorization pursuant to Sections 9 and 10, and if such authorization is or was required as to any of the structures, whether statutorily sufficient authorization was obtained.

1. *Section 9*

Section 9 provides that it shall be unlawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any navigable water until (1) the consent of Congress to such construction has been obtained, and (2) the plans for such construction have been approved by the Chief of Engineers and the Secretary of the Army. That

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[16]Federal defendants' reliance on *Amtrak, supra*, 414 U.S. 453, 94 S.Ct. 690, is inapposite. In that case the legislative history expressed a clear intent to exclude private suits, except as to certain cases, involving labor agreements where private suits were expressly authorized. 414 U.S. at 457-465, 94 S.Ct. 690. Nor does *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972), support federal defendants' position. In that case the court held an individual may not sue on behalf of the public for general injuries caused by violations of the Rivers and Harbors Act of 1899. The court expressly reserved the question decided here, whether a private claimant specifically injured by a violation may sue for an injunction or damages. 457 F.2d at 89, 90 n. 16. See *James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, 359 F.Supp. 611, 638-640 (E.D.Va), *aff'd*., 481 F.2d 1280 (4th Cir. 1973), for a well-reasoned decision in support of the result reached here. Because this action is one brought not on behalf of the public but rather by private plaintiffs who allege specific injuries to themselves, the Court concludes that a private right of action exists in the present case.

section contains a proviso to the effect that state authorization may replace Congressional consent in the case of waterways whose navigable portions lie wholly within the boundaries of a single state. However, even in that case, approvals by the Chief of Engineers and by the Secretary of the Army are still required.[17]

With respect to the Peripheral Canal, it is clear that Section 9 authorization will be required before any party commences building the Canal as it is presently proposed. At the point where the Canal crosses the Middle River, the Canal will result in the complete damming of the river. Furthermore, there is presently no provision for the passage of boats past the Canal at this location. Such a closure of the Middle River will constitute the building of a "dike" within the meaning of Section 9. In *Citizens Committee for the Hudson Valley v. Volpe*, 302 F.Supp. 1083, 1089 (S.D.N.Y. 1969), *aff'd* 425 F.2d 97 (2d Cir. 1970), the court held that the word "dike" should be defined in ac-

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[17]33 U.S.C. § 401 provides:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army."

cordance with its ordinary meaning. The court found that dike meant, *inter alia*, "[a]n embankment for controlling or holding back the waters of the sea or a river". 302 F.Supp. at 1089. The Court notes that "dam" is defined as "a barrier preventing the flow of water". Webster's Third New International Dictionary, p. 571 (1971). Hence, even though the closure of Middle River will be caused by a structure denoted as a "canal", because that structure will have the effect of a "dam" or "dike", the Court finds that the Peripheral Canal is the type of structure regulated by Section 9. Because the Peripheral Canal will clearly be "in" the Middle River, the only issue remaining is whether Section 9 prohibits any dikes or only those dikes which obstruct navigation. Although the legislative intent underlying the enactment of Section 9 may well have been to prohibit unreasonable obstructions to navigable waters, it seems likely that Congress used the word "any" in Section 9 in order to reserve the right to determine whether a given structure created an unreasonable obstruction. Because the Peripheral Canal will obstruct navigation on the Middle River, however, either construction of Section 9 will include the Canal within the section's regulatory prohibitions. *Citizens Committee for the Hudson Valley v. Volpe, supra*, 302 F.Supp. at 1089. *But cf. Petterson v. Resor*, 331 F.Supp. 1302, 1306 (D.Ore. 1971).

With regard to the type of authorization required, since the navigable waters which the Peripheral Canal will obstruct are all wholly within California, Congressional consent is not necessary as long as the Canal is authorized by the California State Legislature. It is not clear to the Court whether the passage of the Burns-Porter Act constitutes such authorization, as that Act did not specifically envision the Peripheral Canal. Because no evidence was adduced at trial as to whether the legislature has subsequently authorized the construction of the Canal, the Court merely holds that

such authorization must be obtained prior to the commencement of construction. Moreover, defendants must obtain a Section 9 permit from the Corps of Engineers and the Department of the Army prior to construction.

With respect to the Delta and Tracy Plants, plaintiffs argue that various components of these facilities constitute the type of structures regulated by Section 9. Most of these components, however, are clearly not "over or in" any of the navigable waters in question, and those few components which arguably are "over or in" navigable waters are not the type of structure regulated by Section 9. Both of the main pumping plants of the Tracy and Delta Plants are at least two miles distant from any navigable waters and are connected thereto only through the construction of certain man-made inlet channels. The only components which would be said to be "over or in" navigable waters are the headworks and fish protective facilities of the Tracy Plant.[18] However, these components are not a "bridge, dam, dike, or causeway".[19] Accordingly, neither the construction

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[18] The headworks and fish protective facilities of the Delta Plant are not "over or in" navigable water because they are set back on a small inlet constructed by the state defendants off West Canal.

[19] The Court need not decide whether the Tracy Plant headworks or fish protective facility is "over or in" navigable waters, as neither structure fits within the definitions of any of the structures enumerated in Section 9. Clearly neither is either a "dam" or a "dike" as defined, *supra*, since neither is "an embankment for controlling or holding back the waters of the sea or a river" or is "a barrier preventing the flow of water". They also are not causeways, as neither is "a raised road across water or marshy land with water or marshy land on both sides of the road". *Citizens Committee for the Hudson Valley v. Volpe*, *supra*, 302 F.Supp. at 1089. Finally, neither structure is a bridge as neither is "a structure erected over a depression or obstacle to travel (as a river, chasm, roadway, or railroad) carrying a continuous pathway or roadway (as for pedestrians, automobiles, or trains)." Webster's Third New International Dictionary, p. 276 (1971). The scope of Section 10 of the Rivers and Harbors Act of 1899 is substantially broader than the proscriptions of Section 9 as the latter section regulates only several specific types of structures while the former section utilizes very general language so as to include within its proscriptions both certain specific structures and any structure which has the effect of obstructing navigable capacity.

of the Tracy or Delta Plants nor of any of their component structures was unlawful with respect to Section 9.

2. *Section 10*

Section 10 contains three proscriptive clauses. The first clause prohibits the creation of any obstruction to navigable capacity not affirmatively authorized by Congress. The second clause makes it unlawful to build or commence the building of certain structures except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Finally, the third clause makes it unlawful to alter or modify in any manner the condition or capacity of the channel of any navigable water unless such alterations or modifications are recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.[20]

a. *Scope of Section 10*

In determining whether Section 10 requires authorization of the three structures involved in this case, the Court confronts two threshold questions concerning the coverage of that section. First, defendants contend that because certain

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[20]33 U.S.C. § 403 provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

of these structures are not located over or in any navigable water, they are not within the ambit of Section 10. This contention is without merit. It is clearly established that Section 10 does not require the existence of an obstruction over or in navigable waters. *United States v. Republic Steel Corp.*, 362 U.S. 482, 486, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708, 19 S.Ct. 770, 43 L.Ed. 1136 (1899). *See Wisconsin v. Illinois, supra*, 278 U.S. 367, 49 S.Ct. 163; *Sanitary District of Chicago v. United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925). In *Republic Steel* the obstruction to navigable capacity was caused by defendant's dumping of industrial solids into a river. In *Wisconsin v. Illinois* and in *Sanitary District of Chicago*, the obstruction consisted of a lowering of the water level of Lake Michigan as the result of the diversion of lake water through the Chicago River Drainage Canal. Finally, in *Rio Grande* the obstruction was caused by a dam in a portion of a nonnavigable waterway which fed into the navigable waters in question. Defendants' contention that Section 10 is inapplicable to the instant case because both the Delta and Tracy Plants are approximately two miles from navigable waters is untenable if these structures in fact create obstructions to navigable capacity. The test of whether a Section 10 permit is required for a particular project is not wholly dependent upon the location of specific structures but looks also to the operational effect of the project. It is not only the physical structure of the Delta Plant, the Tracy Plant, or the Peripheral Canal which is significant but also

the operation of these structures.[21] If the functional effect of these structures is to obstruct navigable capacity in the Delta, then Section 10 approval will be required.

Second, defendants contend that in order to establish a violation of Section 10, plaintiffs have to prove that the actions in question actually affect navigation. Yet the plain wording of the statute is directly at odds with such a construction. Moreover, Section 9 demonstrates that Congress must have been aware of the difference between obstructions to navigation and obstructions to navigable capacity. Although research has not revealed any case which is dispositive of this question,[22] the Court concludes that once

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[21] As far as the Peripheral Canal is concerned, it is not clear whether the necessity to obtain authorization under Section 9 preempts the need for Section 10 approval. See pp. 626-627, *supra*. It is the opinion of the Court that no such preemption automatically occurs. The two sections deal with different although possibly related problems and therefore satisfactory resolution of one would not necessarily imply adequate resolution of the other. More specifically, the consequences of the damming of Middle River may be different and are more or less independent from those which arise due to the diversion of water from the Sacramento River. Clearly, however, defendants are not precluded from seeking and obtaining Section 9 and 10 authorization from the Secretary of the Army in one proceeding or one permit application.

[22] The principal Section 10 cases are not dispositive of this question. Because the findings of fact of the lower court are not reported in *Sanitary District of Chicago*, it is not clear whether the plaintiff in that case introduced any evidence of effects on navigation caused by the diversion of water from Lake Michigan. There were apparently no witnesses at trial who testified that they actually observed the lowering of the Lake Michigan water level. 266 U.S. at 412, 45 S.Ct. 176. Plaintiff apparently relied on the analyses of expert witnesses. *Ibid*. The court also found that in 1913 the Secretary of War reviewed the Chicago Drainage Canal diversions, including "the obvious fact that so large a withdrawal would lower the levels of the Lakes and the overwhelming evidence that it would affect navigation". However, there is no indication that any of this evidence was adduced at trial. *Ibid*. at 430, 45 S.Ct. at 180. There is language in the opinion which strongly indicates that plaintiffs here need not prove a present effect on navigation. The court stated:

> "Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United

there is a finding that the obstruction in question has a substantial effect on navigable capacity, it is not necessary to prove that on specific occasions the obstruction precluded or limited navigation on the waterway in question by specific vessels. Obstructions to navigation differ from obstructions to navigable capacity. The former denotes the actual, present obstruction of navigation while the latter denotes the potential or capacity to obstruct navigation currently or in the future. Proof of the former requires a showing that navigation by specific vessels is presently obstructed while proof of the latter only requires a showing that a condition exists which would obstruct navigation over the waterway if it existed. In the latter case all that is required is proof of the condition which creates the obstruction which has a substantial effect on navigable capacity. Once plaintiffs prove this fact, it is immaterial that they do not prove that navigation by specific vessels on the waterway in question is presently obstructed.

States, even were there no international covenant in the case." *Ibid.* at 426, 45 S.Ct. at 179.

Additionally, it is relevant to contrast the extent of the diversions in that case with those in the instant case. In *Sanitary District of Chicago*, the United States sought to enjoin any diversion of water from Lake Michigan in excess of 4,166 cfs (250,000 cubic feet per minute) while in the instant case the present combined water diversion of the Delta and Tracy Plants is 10,900 cfs. Also, Lake Michigan which has a surface area in excess of 20,000 square miles is a substantially larger body of water than those navigable waters in the Delta out of which the Tracy and Delta Plants will divert water. While the court in *Wisconsin v. Illinois, supra* 278 U.S. at 407–409, 49 S.Ct. 163, expressly found that the Chicago Drainage Canal had an adverse effect on navigation resulting in the loss of 3,346,000 ton miles of water haul on the Great Lakes, it also found that the operation of that canal lowered the water level in four of the Great Lakes by between approximately five and six inches. Finally, in *United States v. Republic Steel Corp., supra*, 362 U.S. at 489, 80 S.Ct. 884, the court reasoned that if the lowering of the water level could constitute an obstruction to navigable capacity, as in *Sanitary District of Chicago*, then the deposit of industrial solids in a navigable river resulting in a decrease in the water depth in that river also constituted an obstruction to navigable capacity. However, the court in *Republic Steel Corp.* did note the shallower water would affect navigation.

Under Section 10 therefore, the question before the Court with respect to each of the three structures involved in this case is whether the structure itself or its operational effect is an obstruction to the navigable capacity of any navigable water. The Supreme Court has defined "obstruction to the navigable capacity" to mean to interfere with or diminish the navigable capacity of the waterway in question.[23] *United States v. Rio Grande Dam & Irrigation Co., supra,* 174 U.S. at 709, 19 S.Ct. 770. Furthermore, whether construction and operation of a particular facility creates an obstruction to navigable capacity is a question of fact. *United States v. Rio Grande Dam & Irrigation Co., supra,* 174 U.S. at 709, 19 S.Ct. 770.[24]

Turning first to the Tracy Plant, the evidence adduced at trial establishes that the operation of the facility has two major effects on water in the Delta: (1) It tends to lower the water levels in the Delta, and (2) It causes net flow reversals.[25] Between 1945 and 1949 the Bureau of Reclamation conducted a study of the effect on Delta water levels of export pumping by the Tracy Plant. The study concluded that with a low flow[26] in the San Joaquin River and with

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[23]Navigable capacity means the capacity for navigation over any part of the waters in question when in their normal condition. *Hubbard v. Fort,* 188 F. 987, 996 (C.C.D. N.J.1911).

[24]In that case the court stated that not every appropriation of the upper waters of a navigable stream would constitute an obstruction to navigable capacity, but rather that the test was whether any such appropriation substantially interfered with navigable capacity within the limits where navigation was a recognized fact.

[25]Because the Delta is directly affected by the Golden Gate tidal cycle, water in the Delta channels and rivers tends to flow both up channel and down channel during the tidal cycle. However, for any given tidal cycle there is a greater volume of flow in one direction and the amount of this excess is the net flow. A net flow reversal occurs when the net flow for a given tidal cycle is in a different direction than the normal direction.

[26]Low flow was defined in the study as the worst condition that could occur.

the Tracy Plant pumping at the rate of 4600 cfs, the Delta water level in the vicinity of Clifton Court Ferry would be lowered approximately four inches, while there would be no measurable change in the Delta water level near the Stockton ship channel. This study utilized a hydraulic and mathematical model and was not based on actual data since the Tracy Plant was not in operation at that time. In 1968 further studies of the effect of the Tracy Plant pumping on Delta water levels were conducted by varying the pumping rates and measuring the actual effect on water levels at various points in the Delta. One study concluded that Delta water levels near the junction between the inlet channel and Old River would be lowered by 1/10 of a foot per 1,000 cfs pumped, and that Delta water levels would be lowered by decreasing amounts per 1,000 cfs in proportion to the distance from the Tracy Plant. Export pumping effects were measurable as far away as the San Joaquin and Sacramento Rivers. Furthermore, a preliminary draft, subject to review, of the State's Environmental Impact Report (Plaintiffs' Exhibit 17), predicted that at a future export rate of 15,000 cfs, water levels near the San Joaquin River[27] could be lowered as much as 1½ feet at low tide.[28]

The evidence also established that the operation of the Tracy Plant has caused a greater flow of San Joaquin River water into Old River toward the Tracy Plant than occurred under pre-Tracy Plant conditions, and during summer pe-

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[27]However, at trial, Gerald Cox, a civil engineer with the Department of Water Resources, testified that the preliminary draft was inaccurate in that the point referred to was actually at Clifton Court Ferry which he felt was some distance from the San Joaquin River.

[28]The data from part of the 1968 studies reflects the effect on Delta water levels from the combined export pumping of both the Tracy and Delta Plants. However, part of the study isolated the effects attributable to the Tracy Plant and reached almost the exact same results as the 1945-1949 study.

riods of low flow in the San Joaquin, there can be a net reversal in the flow of the San Joaquin River between San Andreas Landing and Old River. Additionally, operation of the Tracy Plant in conjunction with the Delta Cross Channel also draws water from the Sacramento River on the edge of the Delta to the interior Delta and to the export pumps.

Similarly, the operation of the Delta Plant tends to lower water levels in the Delta region and to cause net flow reversals. Prior to the construction of Clifton Court Forebay, the Delta Plant operations resulted in lowered water levels in Italian Slough and caused bank erosion problems due to the increased speed of flow. A test conducted by the State in August and September of 1968 indicated that an increase in pumping by 6100 cfs by both the Delta and Tracy Plants resulted in a lowering of the water level in Italian Slough by 9/10 of a foot. Subsequent tests indicated that diversions of water into Clifton Court Forebay would have an even greater effect on water levels in the Delta. Combined diversions by the Forebay intake facility and the Tracy Plant between 9600 and 12,000 cfs during both high high and low high tides resulted in a lowering of the water level at Clifton Court Ferry by 1 to 1½ feet and a lowering at Rindge Pump (located on the San Joaquin River) of just under 1/10 of a foot.[29] While there may be some question as to the accuracy of these figures, they are found to be the minimum effect on Delta water levels of water diversions by the Forebay and the Tracy Plant[30] since they were offered by the

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[29]Throughout this most recent test in May of 1974, the Tracy Plant operated at close to its maximum pumping capacity. Hence, the test results would seem to reflect only those changes in the water level due to the Delta Plant diversions.

[30]During the trial Dr. James A. Harder, an expert witness for the state defendants, stated unequivocally that if the Clifton Court Forebay radial gates were opened wide at low low tides, and the water level of the Forebay was lower than that at Clifton Court Ferry, then the water level outside the Forebay would be lowered.

state defendants. It is quite conceivable that the effects could be greater and it is highly probable if not certain that an expanded pumping capacity would result in even greater effects.

The operation of the Delta Plant has caused net flow reversals in the San Joaquin River during some summer months, and during most of the year in the Old and Middle Rivers. The state defendants marked for identification a chart which apparently illustrated some specific effects on flow reversals as a result of export pumping by the Delta and Tracy Plants. This exhibit was not introduced into evidence, and hence there is no detailed evidence of the magnitude of net flow reversals caused by export pumping. There was, however, testimony from which it can be inferred that operation of the Clifton Court Forebay intake facility has the potential to affect water velocities significantly in nearby channels.[31] Finally, a preliminary draft subject to revision, of the State's Environmental Impact Report on the Peripheral Canal contained statements from which the Court could infer that Delta export pumping through the Tracy and Delta Plants caused the Old and Middle Rivers to flow upstream occasionally at Bacon Island and caused the San Joaquin River to flow upstream occasionally below the head of Old River.

With respect to the proposed operation of the Peripheral Canal, the evidence established that there would be significant effects on the velocity and water level of the Sacramento River. If constructed, the Peripheral Canal will divert

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[31]There was testimony that the operation of the Clifton Court Forebay radial gates was limited by the state defendants so that the water velocity in the nearby channels would not exceed 3 feet per second. The reason for this operational limitation was to prevent bedload movement in the adjacent channels. Bedload movement is the movement of the bottom sands of the channel due to high water velocity.

waters from the Sacramento River near Hood, California. The rate of flow of water in the Sacramento River at that location varies between 10,000 cfs and 100,000 cfs. Donn J. Stafford, a civil engineer with the Department of Water Resources, testified that at various times during the year the Canal would divert significantly more than 50% of the Sacramento River flow and at times could divert as much as 80% of that flow. It also appeared that diversion would decrease the velocity and lower the water level of the Sacramento River downstream from the Peripheral Canal intake. Finally, the Canal would result in the closure or modification of a number of rivers and sloughs in the Delta including the complete damming of the Middle River. With respect to the Middle River closure, no provision has been made for the passage of boats past this point on the River.

In sum, with respect to the Delta and Tracy Plants the evidence adduced at trial was clear and convincing that export pumping by these facilities both lowered Delta water levels and at certain times caused net flow reversals in Delta waterways. Although it is true that the exact magnitude of these effects was not precisely established, it is clear that they are far from any sort of *de minimis* exception established by *Rio Grande*. Because there was evidence that the water level would be lowered at least one to 1½ feet in the vicinity of Clifton Court Ferry, the Court will not decide whether the smaller effects (i.e., several inches) at locations considerably more distant from the pumping plants, standing alone, would constitute a sufficient obstruction to navigable capacity so as to require Section 10 approval.

With respect to the Peripheral Canal, the evidence regarding the anticipated effects on navigable capacity was even less precise with respect to magnitude but equally convincing that the effect would be substantial. It was clear that at various times throughout the year the Peripheral Canal

would divert substantial amounts of water from the Sacramento River in the vicinity of Hood, California, and that these diversions would both lower the water levels and decrease water velocities downstream from the intake facility.

Accordingly, the Court concludes that the operation of the Tracy and Delta Plants presently obstructs the navigable capacity of various navigable waters in the Delta.[32] The Court further concludes that as presently proposed, the Peripheral Canal will also result in an obstruction to navigable capacity of the Sacramento River. More specifically, the Court finds that, in the case of each of the three facilities, the obstruction is the result of the modification or alteration of the condition or capacity of the channel of navigable water of the United States and hence is governed by the third clause of Section 10.

b. *Authorization under Section 10*

Since Section 10 requires that authorization be obtained for the construction and operation of the Tracy and Delta Plants and the proposed construction and operation of the Peripheral Canal, the Court now turns to the question whether any of these facilities has been properly authorized. Although the statute itself is somewhat unclear as to what constitutes proper authorization, in a case such as the instant one governed by the third clause, the United States Supreme Court definitively resolved this ambiguity in the landmark case of *Wisconsin v. Illinois*, *supra*, 278 U.S. 367, 49 S.Ct. 163. The Court held in that case that congressional author-

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[32]The operation of the Delta and Tracy Plants results in the obstruction of the navigable capacity of Old River, which is a navigable water of the United States. Since obstruction of the navigable capacity of this river suffices to bring the Tracy and Delta Plants within the scope of Section 10, the Court need not decide to what extent diversions by the Tracy and Delta Plants obstruct the navigable capacities of sloughs, canals, and other rivers in the Delta.

ization was not necessary for obstructions within the purview of the second and third clauses of Section 10 and that those obstructions need only be recommended by the Chief of Engineers and authorized by the Secretary of the Army.[33] 278 U.S. at 412-413, 49 S.Ct. 163. While congressional consent is an alternative, it is not necessary for obstructions falling within the second and third clauses of Section 10 if the approval of the Secretary of the Army is obtained.

Accordingly, the Court addresses the question whether any of the three facilities has been authorized by Congress or by the Secretary of the Army upon recommendation by the Chief of Engineers. With respect to the Peripheral Canal, defendants make no contention that such authorization has been obtained.[34] With respect to the authorization of the Delta and Tracy Plants, defendants have made three basic contentions regarding authorization: (1) that various Section 10 permits which have been issued over the years authorize the facilities, (2) that approval of the navigation aspects of the subject matter of FPC license application No. 2426 by the Secretary of the Army and the Chief of Engineers eliminates the need for Section 10 approval, and (3) that any number of congressional acts (mostly appropriation acts)

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[33]The main problem is interpreting the interrelationship of the three clauses in Section 10. These could be read as three independent prohibitions proscribing three different and mutually exclusive types of obstructions. However, in one early case, a lower court held that congressional consent was mandatory as to each type of obstruction and that clauses two and three were merely delegations to the Secretary of the Army of a supervisory power over the character and performance of the proposed construction where the work in question was of the specific type described in those clauses. *Hubbard v. Fort*, *supra*, 188 F. at 997. That position was expressly overruled in *Wisconsin v. Illinois*, *supra*, 278 U.S. at 412-413, 49 S.Ct. 163.

[34]With respect to the Peripheral Canal, it is conceded that its construction will require authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899. For the reasons set forth herein, a permit under Section 10 will likewise be required for its operation.

constitute congressional consent pursuant to clause one of Section 10. For the reasons set forth below, the Court disagrees with all three contentions and, accordingly, finds the construction and operation of the Tracy and Delta Plants without the required authorization to be unlawful.

i. *Section 10 Permits*

The federal defendants contend that the Secretary of War approved the Tracy Plant in a letter to the Secretary of Interior dated February 15, 1946. At the trial that letter was never offered as an exhibit and although the federal defendants never abandoned this contention, they did not provide the Court with a copy. The Court, taking judicial notice of the letter which is contained in S.Doc. No. 113, 81st Cong., 1st Sess. 275 (1949), obtained a copy of the letter from the Public Library. An examination of this letter revealed that its subject matter basically concerned a jurisdictional dispute between the Department of Interior and the Department of War over the construction and operation of reservoir projects in the Sacramento-San Joaquin Basin. Nowhere in the letter was the Tracy Plant specifically mentioned. The only tenuous connection between the Tracy Plant and the letter is that the Tracy Plant was part of the broad plan for the Central Valley Basin referred to in the letter. The letter on its face characterizes itself as the views and recommendations of the War Department on the Bureau of Reclamation's report on the Central Valley Basin pursuant to Section 1 of the Flood Control Act approved December 22, 1944. Additionally, this letter does not rise to the level of formality of the other Section 10 permits introduced into evidence. Not only does this letter not constitute a Section 10 permit, it is clear that it does not even constitute approval of the Tracy Plant.

The federal defendants next contend that in any event in 1955 the Bureau of Reclamation applied for and received

a permit to construct fish collecting facilities and headworks at the junction of the Old River and the Tracy Plant intake channel, and that this permit constitutes Section 10 authorization. However, the narrow scope of that permit simply does not support such a contention. It provided specifically that "[t]he structures and work shown on the drawings hereto attached and presented in your letter dated 25 August 1955, for construction of headworks and fish collecting facilities at the junction of Old River and the Delta-Mendota Canal, Contra Costa County, California, have been recommended by the Chief of Engineers and are authorized by the Secretary of the Army." See Plaintiffs' Exhibit 22. In this permit no mention is made of the other structures (*i.e.*, the pumping plant) or of the operation of those facilities. The limited scope of the permit is also reflected in the Bureau of Reclamation's application. That application describes the proposed construction of the headworks and fish collecting facilities. It specifically states that "[r]equest is hereby made for a permit for the Bureau of Reclamation to construct the headworks and fish collecting facilities in accordance with the above data and drawings." See Plaintiffs' Exhibit 22. Additionally, in the application, the Bureau of Reclamation states that it is not sure whether "a permit from you will be necessary *to perform this particular work*" (emphasis supplied), but is submitting one anyway so that the Corps can make the determination. See Plaintiffs' Exhibit 22.

The state defendants contend that various Section 10 permits issued with respect to certain components of the Delta Plant constitute authorization under Section 10 of the construction and operation of the entire Delta Plant and not merely the specific components. The Department of Water Resources at no time applied for a permit from the Chief of Engineers or the Secretary of the Army pursuant to Sec-

tions 9 and 10 of the Rivers and Harbors Act of 1899 with respect to the construction of the Delta Plant or its original intake channel. It did, however, apply for several Section 10 permits in conjunction with the construction of Clifton Court Forebay. On June 28, 1966, the Department of Water Resources applied for a Section 10 permit authorizing it to build a permanent dike across Italian Slough approximately one mile southwest of Old River. Although the Corps issued such a permit (#4014) on February 10, 1967, the Department of Water Resources abandoned its plan and instead built a closure dike at the junction between the original intake channel and Italian Slough.[35] On February 24, 1967, the Corps issued a permit (#4006) authorizing the construction and maintenance of a water quality monitoring recorder station in Old River at Clifton Court Forebay. On May 3, 1967, the Department of Water Resources applied for a Section 10 permit to cut the westerly levee of West Canal and Old River in order to build an inlet control structure for Clifton Court Forebay. Subsequently, permit #4101 was issued on June 15, 1967, authorizing the cutting of the westerly levee of West Canal. Finally, on June 17, 1969, the Corps of Engineers issued permit #4410 authorizing the Department of Water Resources to install velocity meters and bury armored cables five feet deep in West Canal. That permit contained a condition requiring the Department of Water Resources to comply promptly with regulations of the Federal Water Pollution Control Administration and/or the state water pollution control agency having jurisdiction.

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[35]It should be noted that the Department of Water Resources never received a permit to construct this dike. However, in its application for a permit to construct the Clifton Court Forebay inlet control structure, see *infra*, the Department did state that "[w]hen the forebay becomes operational, we will close our present inlet structure by replacing a section of the Italian Slough levee." See Plaintiffs' Exhibit 25.

The Court finds that these permits do not constitute Section 10 authorization. These permits authorized only the specific construction work described in the applications and not the construction of the entire pumping plant facilities. It is insufficient to assert that because the Corps of Engineers was a member of the Interagency Delta Committee and a participant in other studies of Delta water problems, it must have had constructive knowledge of the entire facility, and consequently that approval of the components must be deemed approval of the whole facility. There is no direct evidence from the particular permit files that the Corps was approving the entire facility when it approved the various components.[36] Even assuming strong circumstantial evidence of constructive knowledge, this evidence would not constitute approval of the construction of the facilities. The fact that the Corps had knowledge of the Delta Plant does not imply that it approved the Delta Plant. Additionally, it is clear that all of these permits were obtained after construction had commenced. Even if the Court believed that these permits authorized the *construction* of the Delta Plant, it is clear that they do not authorize the *operation* of that facility. Because of the clear adverse effects on navigable capacity and the possible adverse enviromental effect of export pumping under certain factual situations, it is inconceivable that the Corps of Engineers would have granted any permits without incorporating certain conditions of operation therein, and without appending in its files a sufficient factual record to show the type of consideration required by the Rivers and Harbors Act of 1899 and the various

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[36]See Plaintiffs' Exhibits 22, 22A, 23, 24, 24A, 25, 25A; State Defendants' Exhibit 11.

environmental statutes then in effect.[37] The Department of Water Resources recognizes certain adverse effects of the Delta Plant diversions, and it has an operational policy of never opening the Forebay radial gates during the three-hour period before and after low low tide. Additionally, it operates those radial gates so as never to allow the water velocity in the nearby channels to exceed three feet per second. In the absence of a clear showing that the Corps was in fact approving the operations of these facilities, the Court is compelled to find no authorization through the Section 10 permit procedure. It seems most likely that the Corps misconstrued the scope of Section 10's coverage.[38]

ii. The FPC License

The state defendants next contend that approval by the Corps of Engineers of the navigational aspects of the subject matter underlying FPC license application No. 2426 constituted Section 10 approval or eliminated the need to obtain Section 10 approval. In December of 1965 the state applied for a Federal Power Commission license for the California Aqueduct and certain other structures, some of which were power related. Among the structures included in the application were the Delta Plant and its appurtenant structures and the Clifton Court Forebay. FPC procedures required the administrative law judge to submit the application to the Corps of Engineers for approval of all navigational aspects of the Project. See 16 U.S.C. § 797(e). Although the Corps

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[37]For instance, the permits might have limited export pumping to certain levels during the dry parts of the year and during certain parts of the tidal cycle.

[38]In considering an application for a Section 10 permit, the Secretary of the Army and the Chief of Engineers must weigh the conservation effects of the subject matter of the application. *Zabel v. Tabb*, 430 F.2d 199, 213 (5th Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). Moreover, the Secretary of the Army can refuse to issue a Section 10 permit on conservation grounds. 430 F.2d at 214.

sent approval in the form of a letter dated May 18, 1966, there is no evidence that the Corps gave consideration either to environmental factors or to the effect on navigation of water diversions (*i.e.*, by causing changes in water levels and net flow reversals). Although the administrative law judge eventually authorized the license, the FPC reviewed his decision and confined the jurisdiction of the license to those portions of the project involving power facilities, all of which are in Southern California. *Department of Water Resources*, FPC Opinion No. 688 (February 6, 1974).[39]

The Court finds the state defendants' contentions with respect to FPC license application No. 2426 unfounded. It is not entirely clear to what extent FPC jurisdiction and regulation preempts regulation by Sections 9 and 10 of the Rivers and Harbors Act of 1899. One court has held that no Section 10 permit is required for the construction of a hydroelectric plant licensed by the FPC. *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162, 167 (S.D.N.Y.1973) *aff'd* 499 F.2d 127 (2d Cir. 1974). The Court does not believe that that decision was intended to allow back-door approval of any structure however remotely related to the basic power project. In *Scenic Hudson* the court limited its holding to the hydroelectric plant. In the instant case the FPC restricted its jurisdiction to those portions of the project involving power facilities and hence *Scenic Hudson* is unhelpful to the state defendants. The rationale underlying *Scenic Hudson* is that there should be one centralized procedure to obtain federal approval of power projects. Its purpose was not to grant an applicant blanket approval for any and all facilities which he described

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[39]The Court notes that the FPC also remanded the license proceeding to the administrative law judge in order to comply with the NEPA procedures outlined in *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972).

in his license application. Additionally, it is no assistance to state defendants that the Corps sent its letter of approval prior to the FPC's jurisdictional decision. It is quite possible that the Corps felt it was granting approval only to those structures over which the FPC eventually asserted jurisdiction. Also, because the Corps' letter was dated May 18, 1966, and because the state's FPC license application was not amended to include the Clifton Court Forebay until July 10, 1967, it is clear that the May 18th letter did not take into account the Clifton Court Forebay.[40] Notwithstanding *Scenic Hudson* because the Delta Plant will not be within the jurisdiction of any subsequently issued FPC license No. 2426, the Court must independently assess the May 18th letter and determine whether that constituted Section 10 authorization of the operation of the Delta Plant. The Court concludes that the Corps never seriously took under consideration the effect of water diversions by the Delta Plant when it sent its letter of approval. The letter itself states that "[t]he plans of the structures affecting navigation are satisfactory". This language tends to indicate that if the Corps gave consideration to anything, it was the structures themselves and not the operation of those structures. In the absence of a clear showing that the Corps intended their letter to serve as a Section 10 approval for the Delta Plant, the Court refuses to so construe it.

iii. *Congressional Authorization*

The Court also concludes that Congress did not affirmatively authorize any of the facilities in question. Defendants concede that they have obtained no congressional approval

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[40]In the Agreed Pre-Trial Order the state defendants contended that there was a second letter from the Corps to the FPC dated January 25, 1968. See Agreed Pre-Trial Order, § 4.52. Although that letter was introduced into evidence, it did not in any way indicate approval of the navigational aspects of the project.

of the Peripheral Canal. The federal defendants contend, however, that certain acts of Congress (including, *inter alia*, appropriation acts) constituted consent to the Tracy Plant. Without specifically discussing each individual act, the Court makes the following observations. The initial authorization to create an obstruction must rest on express and not implied congressional authority. *Cf. Hubbard v. Fort*, *supra*, 188 F. at 996. The approval or funding of a facility does not compromise Congress's right to control its operation. *Sanitary District of Chicago v. United States*, *supra*, 266 U.S. at 428, 45 S.Ct. 176.

In the instant case none of the acts in question either contain sufficiently explicit language or are accompanied by a legislative history clearly manifesting approval of the facilities for the purpose of Section 10. For the most part these acts do not even refer specifically to the pumping plant but rather are very general approvals of the Central Valley Project or the San Luis Unit.[41] All Congress did was au-

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[41]In the Act authorizing the construction of the San Luis Unit of the Central Valley Project, Congress imposed certain restrictions on the operation of that unit. Public Law 86-488, 74 Stat. 156. Specifically, Section 4 of that Act purportedly limited the daily diversion from the Delta via the Tracy Plant under certain conditions. Even if this section were effective, it does not constitute congressional consent. The Act authorized the San Luis Unit (consisting of, *inter alia*, the San Luis Dam, the San Luis Reservoir, the San Luis Forebay (O'Neil Forebay), and the San Luis Canal (California Aqueduct)) and not the Tracy Plant which was already in operation. The fact that Congress places certain limitations on the operation of an already existing facility does not, standing alone, constitute Section 10 authorization for the already existing facility. Section 4 would be just as consistent with an intent to require the diversion of high quality water as it would with an intent to solve navigational and environmental problems in the Delta. Moreover, that section may not be effective, since it appears to be conditioned upon the operation of the San Luis works *solely* as a federal project. The San Luis works are joint use facilities of the state and federal governments. See Agreed Pre-Trial Order, § 3.22. Further, this Act was enacted several years after the commencement of the operation of the Tracy Plant, and hence even if it were intended as Congressional consent, the original construction and operation of the Tracy Plant were unlawful.

thorize the construction of those projects and appropriate funds for them. Congress did not, however, agree to relinquish its Section 10 responsibilities or exercise this power in any respect.[42] Even if Congress had gone so far as specifically to fund the construction of the Tracy Plant precisely as it stands today, this fact would not constitute authorization to operate it, as before operation occurred, either Congress or the Corps of Engineers would have to consider within what Section 10 parameters the Tracy Plant could operate and issue an appropriate authorization.

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[42] In *Sanitary District* the Secretary of War had turned down the defendants' Section 10 permit application. Defendants had argued that a prior congressional act granting land to the State of Illinois for a canal to unite the waters of the Illinois River with those of Lake Michigan constituted authorization. The Court rejected their contention stating that:

> "The act granted land to Illinois in aid of a canal to be opened by the State for the purpose of uniting the waters of the Illinois River with those of Lake Michigan, but if it has any bearing on the present case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the Lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the amount of water to be drawn from Lake Michigan. It seems that a less amount than now passes through the canal would suffice for the connection which the United States has wished to establish and maintain." 266 U.S. at 427–428, 45 S.Ct. at 179. State defendants' reliance upon *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973) *en banc*, *cert. denied*, 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974), is misplaced. There, congressional intent was quite explicit both on the face of the acts in question and in the accompanying legislative history. Similarly, in *United States v. Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940), the Court held that Congress could suspend certain provisions of a prior act (military re-enlistment allowances) through an amendment to an appropriation bill. However, in that case congressional intent was manifestly clear from both the language of the Act and the Legislative history.

Accordingly, the Court concludes that the operation of the Tracy and Delta Plants obstructs the navigable capacity of various waters in the Delta, and because these obstructions are the result of the modification or alteration of the condition or capacity of the channel of navigable water, they are governed by the third clause of Section 10. Additionally, because the Court concludes that appropriate authorization has not been obtained, the operation of the Tracy and Delta Plants is and will be unlawful until the proper authorization is obtained. The Court also concludes that, as presently proposed, the operation of the Peripheral Canal will obstruct the navigable capacity of navigable water of the United States, and this obstruction will be governed by the third clause of Section 10. Because the parties concede that no authorization has been obtained for the Canal, operation of the Canal in the absence of proper authorization would be unlawful.

III. FISH AND WILDLIFE COORDINATION ACT

In their third claim for relief, plaintiffs allege that the construction and operation of the Delta and Tracy Plants, and the proposed construction and operation of the Peripheral Canal, are in violation of Sections 2 and 3 of the Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. §§ 662 and 663.

Section 1 of FWCA is a general policy statement setting forth a declaration of the congressional purpose underlying the Act, namely, that wildlife conservation receive equal consideration with other features of water-resource development.[43] Whenever the waters of any body of water are

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[43]Section 1 provides:

"For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and

proposed or authorized to be impounded or diverted by any federal agency or by any public or private agency acting under Federal permit or license, Section 2(a) of FWCA requires that agency first to consult with the United States Fish and Wildlife Service and with the state agency having jurisdiction over fish and wildlife with a view to the conservation of wildlife resources.[44] Section 2(b) requires, *inter-*

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significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance and coordination of wildlife conservation and rehabilitation for the purposes of sections 661 to 666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of said sections." 16 U.S.C. § 661.

[44]Section 2(a) provides:

"Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development." 16 U.S.C. § 662(a).

alia, that Section 2(a) reports be made an integral part of any report prepared or submitted by a federal agency responsible for engineering surveys to Congress or to any agency having the authority to authorize the construction of the water resource development project.[45] Finally, Section 3(a) states that where a federal agency diverts or impounds water, adequate provision consistent with the primary purposes of the diversion shall be made for the conservation, maintenance and management of wildlife resources, including the development and improvement of wildlife re-

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[45]Section 2(b) provides:

"In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which sections 661 to 666c of this title apply. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." 16 U.S.C. § 662(b).

sources, pursuant to the provisions of Section 2.[46] Although FWCA was amended in 1958, the predecessor provisions had substantially the same language and created equally extensive duties.

The Court first addresses the question whether any private right of action arises under FWCA. The only authority on this question of which the Court is aware has answered in the negative. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F.Supp. 749, 754 (E.D.Ark.1971). See *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F.Supp. 728, 739 (E.D.Ark. 1971). Further, plaintiffs simply have not established that inference of such a private right of action would be consistent with the legislative intent of FWCA and with the effectuation of the purposes intended to be served by the Act, as required by *Cort v. Ash, supra*, 95 S.Ct. 2080; *Securities Investor Protection Corp. v. Barbour, supra*, 95 S.Ct. 1733; and *Amtrak, supra*, 414 U.S. at 457-458, 94 S.Ct. 690. It seems likely that congressional enactment of the National Environmental Policy Act acts

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[46]Section 3(a) provides:

"Subject to the exception prescribed in section 662(h) of this title, whenever the waters of any stream or other body of water are impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, adequate provision, consistent with the primary purposes of such impoundment, diversion, or other control, shall be made for the use thereof, together with any areas of land, water, or interest therein, acquired or administered by a Federal agency in connection therewith, for the conservation, maintenance, and management of wildlife resources thereof, and its habitat thereon, including the development and improvement of such wildlife resources pursuant to the provisions of section 662 of this title." 16 U.S.C. § 663(a).

as an implicit proscription of such a private right of action.[47] Additionally, H. R. 14527 introduced in the House of Representatives in 1974 would amend FWCA so as explicitly to establish a private right of action. H.R. 14527, 93d Cong., 2d Sess. §10 (1974). Although not conclusive evidence with respect to the instant issue, H.R. 14527 does indicate that at least certain members of Congress believe that further legislation is necessary to create a private right of action under FWCA. The Court concludes that no private right of action arises under FWCA and, accordingly, the Court dismisses plaintiffs' third claim with prejudice.

IV. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Plaintiffs' fourth claim for relief alleges that the construction of the proposed Peripheral Canal and the proposed increases in the volume of water to be pumped at the Tracy and Delta Plants, together with any modifications thereto necessary to accommodate such increases will violate the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.*, unless adequate Environmental Impact Statements (EIS) are first prepared by the responsible federal agencies.

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[47]The courts have held that compliance with the National Environmental Policy Act will automatically satisfy the requirements of FWCA and that there will be no need separately to comply with FWCA. *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 356 (8th Cir. 1972). *See Environmental Defense Fund, Inc. v. Corps of Engineers, supra*, 325 F.Supp. at 754. *Cf. Cape Henry Bird Club v. Laird*, 359 F.Supp. 404, 417 (W.D.Va.1973), aff'd., 484 F.2d 453 (4th Cir. 1973). Any failure to comply with FWCA should be challenged in a suit attacking the adequacy of compliance with NEPA. *See Environmental Defense Fund, Inc. v. Corps of Engineers, supra*, 325 F.Supp. at 754. *Cf. Cape Henry Bird Club v. Laird, supra*, 359 F.Supp. at 418.

Section 2 of NEPA sets forth the congressional purposes of NEPA.[48] Section 101 of NEPA contains a congressional declaration of national environmental policy.[49] Section 102

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[48]Section 2 states:

"The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. §4321.

[49]Section 101 states:

"(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

"(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may-

"(1) fulfill the responsibilities of each generation as trustee of the environment for suceeding generations;

"(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

"(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undersirable and unintended consequences;

"(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

"(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

"(6) enhance the quality of renewable resources and approach

(footnote continued on following page)

of NEPA establishes a mandatory procedure to compel consideration of and adherence to the newly enacted environmental policy by requiring the completion of an EIS before major federal actions significantly affecting the quality of the human environment can be taken.[50] The EIS is signif-

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the maximum attainable recycling of depletable resources.

"(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. §4331.

[50]Section 102 states:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall-

"(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

"(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by sub-chapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the

icant in two major respects. Firstly, it requires federal agencies to review and assess the environmental effects of major actions they propose to undertake.[51] Secondly, it provides a ready source of information and evidence so that the public, Congress, and the courts can review those major federal actions significantly affecting the environment. Whether NEPA also creates substantive rights and whether courts will perform a substantive, as opposed to merely a procedural, review of an EIS is an unresolved question.[52] However, since there is not a final EIS on any aspect of the

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proposal through the existing agency review processes;

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

"(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

"(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

"(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

"(H) assist the Council on Environmental Quality established by subchapter II of this chapter." 42 U.S.C. §4332.

[51]See CEQ Guidelines §1500.1(a).

[52]*See Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1138-1140 (5th Cir. 1974); *Sierra Club v. Froehlke*, 486 F.2d 946, 953 (7th Cir. 1973); *Conservation Council v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 300-301 (8th Cir. 1972), *cert. denied*, 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1973); *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971); *Calvert Cliffs' Coordinating Comm. v. AEC*, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1115 (1971); *Environmental Defense Fund v. TVA*, 371 F.Supp. 1004, 1013 (E.D.Tenn.1973), *aff'd.*, 492 F.2d 466 (6th Cir. 1974); *Conservation Society v. Secretary of Transportation*, 362 F.Supp. 627, 632 (D.Vt.1973) (Oakes, J.), *aff'd.*, 508 F.2d 927 (2d Cir. 1974). *Cf. Daly v. Volpe*, 514 F.2d 1106, 1108-1109 (9th Cir. 1975); *Lathan v. Brinegar*, 506 F.2d 677, 692-693 (9th Cir. 1974) *(en banc)*. *See also Note, The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 Harv.L.Rev. 735 (1975); *Note, Substantive Review Under the National Environmental Policy Act: EDF v. Corps of Engineers*, 3 Ecol.L.Q. 173 (1973).

Peripheral Canal project before the Court, judgment is reserved on this question until a later day.

The Court must first determine whether the requirements of Section 102 apply to any of the three facilities which are the subject matter of this controversy.[53] There is no question that the operational effects of each of the three facilities will have significant effects on the environment. All of the parties to this suit are in agreement on this point.[54] The main issue is whether there is major federal action present, thus requiring an EIS.

A. *The Peripheral Canal*

With respect to the Peripheral Canal, major federal action can be derived from one or both of two bases. The first of these bases is participation by the Bureau of Reclamation in the construction, operation, or even planning of the Canal, and the second is the issuance of Sections 9 and 10 permits authorizing the construction and operation of Canal.

1. *Bureau of Reclamation Participation*

If there is federal participation in the construction or operation of the Peripheral Canal, it is clear that either act will constitute major federal action necessitating compliance with NEPA. It is not clear, however, whether there is presently, or in the future will be, such federal participation. At the trial, evidence was adduced with respect to the extent of federal participation in the Peripheral Canal project.

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[53]The Court notes that NEPA does not define the term "major federal actions significantly affecting the environment". The Council on Environmental Quality has, however, promulgated certain guidelines and regulations defining the term "actions", CEQ Guidelines § 1500.5, and identifying major actions significantly affecting the environment, CEQ Guidelines § 1500.6.

[54]In the Agreed Pre-Trial Order, the parties stipulated that the Peripheral Canal was a "'project' having a 'significant effect on the environment'" within the meaning of the California Environmental Quality Act. See Agreed Pre-Trial Order, § 3.44.

In the early 1960's the Bureau of Reclamation was active in formulating development plans for the Peripheral Canal and in fact performed the bulk of this development work until 1968 when the Peripheral Canal Feasibility Report was completed. That report was accompanied by a recommendation from the Commissioner of the Bureau of Reclamation that the Secretary of the Interior adopt the report. Subsequently, on July 3, 1969, an Assistant Secretary of the Interior adopted and approved the report. That report proposed construction of the Peripheral Canal as a joint-use project of the federal and state governments to transfer water across the Delta. It discussed the need for such a facility, the basic engineering requirements, the benefits to be derived from its use, and set out a financial analysis of its cost. Additionally, the Feasibility Report proposed that the cost of the Canal be allocated on a 50-50 basis between the state and federal governments. Although the Feasibility Report has never been submitted to Congress, the Bureau of Reclamation has never given the Department of Water Resources any indication that the federal government would not participate in the financing of the construction of the Peripheral Canal nor has the Bureau of Reclamation withdrawn its recommendation which accompanied the Feasibility Report. Notwithstanding the nonexistence of a formal agreement between the state and federal governments *vis a vis* the construction and use of a Peripheral Canal, there existed a common understanding that the Canal would be a mutual undertaking of both the Department of Water Resources and the Bureau of Reclamation.[35] The personnel of those agencies meet periodically to discuss each other's needs with respect to the Peripheral Canal so that the De-

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[35]The Director of the Department of Water Resources testified that he was proceeding on the assumption that the Peripheral Canal would be a joint-use facility of the state and federal governments.

partment of Water Resources can accommodate federal needs. In the absence of direct federal authorization or funding of the construction of the Peripheral Canal, it is quite possible that the state will enter into a wheeling contract[56] with the federal government, and such a contract could be tantamount to join funding.[57] On the record before the Court, then, it is not possible to determine whether the federal government will participate in either the construction or the operation of the Peripheral Canal.

Even if the Bureau of Reclamation does not participate in the construction and operation of the Canal, its participation in the planning phase may constitute sufficient par-

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[56]A wheeling contract is merely an arrangement whereby the federal government would pay the state charges for use of part of the Canal's capacity to transport federal water.

[57]If there is a wheeling contract, the federal payments thereunder will flow into the State Water Project Funding Account. It is a plausible inference that any federal payments credited to the Funding Account would be used both to service the debt responsible for providing funds to construct the Peripheral Canal and to pay operation and construction expenses of the Canal. A wheeling contract could provide for short-term use of the Peripheral Canal by the Bureau of Reclamation while the federal government developed its own facility or made some alternative arrangements to meet its obligations with respect to supplying federal water to the Central Valley. Such an arrangement would not be equivalent to a joint funding of the Canal. However, if the contract provided for federal use of the Canal which approached the physical life of the Canal, and if the amount of the annual wheeling charge approached an amount representing the sum of those annual operation expenses allocable to federal use of the Canal and that amount necessary to repay the imputed federal share of the Canal's cost assuming an appropriate interest rate and amortization of that share of the cost over a given period of time (*i.e.*, either the physical life of the Canal or the life span of any securities used by the state to finance the Canal), then such a wheeling contract might be equivalent to a joint funding of the Canal. As it has been recognized that lease arrangements are forms of financing, in the instant case a wheeling contract containing certain terms could be a form of financing. Accordingly, if the Bureau of Reclamation withdraws from the project and decides to utilize the Peripheral Canal by means of a wheeling contract, this Court will have to decide whether the terms of that arrangement make it equivalent to a joint funding of the Canal or represent mere short-term use.

ticipation in the project to activate the NEPA requirements of an EIS. It is clear from the trial record that the Bureau of Reclamation is more than a mere neutral observer in the Peripheral Canal project. It was the moving force pushing forward the initial development plans, its recommendation of joint participation in the project was approved by the Secretary of the Interior,[58] and it has expended over $750,000 on the planning of the project. Although this expenditure of money alone may not constitute major federal action in light of the large cost of the entire project, it must be seen in connection with two other factors. As recommendations of this nature move up through the federal bureaucracy, they develop an irreversible momentum and result in the irretrievable commitment of resources, particularly in the form of planning and development funds. Bureaucrats develop vested interests in positions adopted at early stages, and it becomes more likely that an EIS prepared at the end of the bureaucratic chain will be nothing more than a post-hoc rationalization of prior development. *See Jones v. District of Columbia Redevelopment Land Agency*, 162 U.S.App. D.C. 366, 499 F.2d 502, 511 (1974). To allow a federal agency to provide all the impetus for planning and development of a project, to fund a portion of this development process although significantly smaller than the funds expended by the state, and to lobby actively in support of that project, and not to require that agency to file an EIS could result in a subversion of the policies underlying NEPA. In view of the independent ground for an EIS in this case, however, discussed below, and because the Bureau of Reclamation's staff is presently preparing an EIS, the Court need not reach this issue.

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[58]See Plaintiffs' Exhibit 14. On July 3, 1969, Assistant Secretary of the Interior James R. Smith approved and adopted the Bureau's feasibility report on the Peripheral Canal.

2. *The Issuance of Section 9 and 10 Permits*

The Court's holding that the construction and operation of the Peripheral Canal will require the defendants to comply with Sections 9 and 10 of the Rivers and Harbors Act of 1899[59] provides the second basis of major federal action with respect to the Peripheral Canal. The issuance of either a Section 9 or 10 permit pursuant to the Rivers and Harbors Act of 1899 always constitutes major federal action and unless the Corps of Engineers or the Department of the Army makes the negative determination that the issuance has no significant effect on the environment, an EIS is required. See *Davis v. Morton*, 469 F.2d 593, 597-598 (10th Cir. 1972); *Citizens for Clear Air, Inc. v. Corps of Engineers*, 349 F.Supp. 696, 707-708 (S.D.N.Y.1972); *Kalur v. Resor*, 335 F.Supp. 1 (D.D.C.1971). *Cf. Scientists' Inst. for Public Information, Inc. v. AEC*, 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973); CEQ Guidelines § 1500.5. It is irrelevant that the project may be neither federally financed nor constructed under the auspices of a federal agency. The key factor is that without federal approval (*i.e.*, in this case a federal permit) the project could not commence, and thus the federal action (*i.e.*, issuing the permit) has as much effect on the environment as federal funding would have. In *Scientists' Inst. for Public Information, Inc. v. AEC, supra*, 481 F.2d at 1091, the court went so far as to hold that *development of a new technology* by a federal agency which would permit private companies to construct facilities having a significant effect on the environment was by itself major federal action requiring compliance with NEPA's EIS requirement. Thus, before the Corps can issue Section 9 and 10 permits for the Peripheral Canal, an EIS must be filed.

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[59]See p. 632, *supra*.

Since the Corps of Engineers is taking major federal action by issuing the permits, normally it would be required to prepare an EIS. However, here where the Bureau of Reclamation has already begun preparation of an EIS, the Court will not require the Corps to duplicate the efforts of the Bureau of Reclamation as long as the Bureau completes preparation of the EIS, prior to the issuance of Section 9 or 10 permits by the corps.[50] Should the Bureau of Reclamation cease preparation of the EIS, then that obligation would devolve upon the Corps.

B. *The Delta and Tracy Pumping Plants*

With respect to the Delta and Tracy Pumping Plants, it is convenient to distinguish the operation of these facilities up to their present maximum capacities from any future expansion of the two facilities. In regard to the former, plaintiffs vigorously assert that because total annual pumping at both structures will increase in future years to reach their present maximum capacities, these increases alone will

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[50]In *Jones v. District of Columbia Redevelopment Land Agency*, *supra*, 499 F.2d at 511, the court held that where an urban renewal plan would be passed upon by three different federal agencies, NEPA required all three agencies to prepare an EIS. An EIS is expensive to prepare and to require both the Corps of Engineers and the Bureau of Reclamation to prepare an EIS on the same project would result in a duplication of effort and unnecessary duplicative expenditures of money. Although it could be argued that two EISes would paint a more balanced and objective picture of the environmental impact of the project, it seems unlikely that the incremental increase in objectivity due to the second EIS outweighs the cost of preparation of a second statement. The essence of *Jones* is not that every agency prepare an EIS, but rather that an EIS be prepared at that first point in the decision-making process where there is major input by federal agency. If the Bureau of Reclamation continued to participate in the Peripheral Canal project, then it would clearly be the more appropriate agency to prepare the EIS since it will be the first agency to shape the plans for the Peripheral Canal. In this fashion environmental considerations would enter into and affect the decision-making process at an earlier stage than if the EIS were prepared by the Corps.

be sufficient to require the filing of an EIS. The Court finds this assertion untenable. It is neither supported in logic nor by the case law. Although NEPA is applicable to further incremental major federal actions occurring subsequent to its effective date even though a project was initiated prior to that date, once a project is complete, there can be no further major action because at the time of completion, the project was capable of operating at maximum capacity and the agencies intended to operate it at full capacity. *See generally Morris v. TVA*, 345 F.Supp. 321, 324 (N.D.Ala. 1972). See CEQ Guidelines § 1500.13. If NEPA were construed to require application to ongoing projects which were fully completed prior to January 1, 1970, most federal agencies would become trapped in an endless web of EIS paperwork. Such an interpretation was not intended by Congress and is not supported by the case law.[61]

Nonetheless, an EIS will be required in this case, because both the Tracy and Delta Plants were constructed and are now operated in violation of Section 10 of the Rivers and Harbors Act of 1899 and Section 10 permits must be obtained in order to continue their operations. In considering these applications, the Corps of Engineers and the Department of the Army should consider the advisablity of setting operational limitations on export pumping by the two

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[61]The logic of plaintiffs' position would require all on-going projects to be assessed even though there may be no future major action otherwise to subject those projects to the EIS requirement. Such a result could be argued to be consistent with the objectives of NEPA in that, given the fixed cost of a totally completed project, where the benefits of shutting down the project outweighed all of the costs of the project, the project should be curtailed. However, plaintiffs' position is without support either in NEPA or in the cases construing it.

plants.[62] An agency which violates the law by failing to obtain the necessary permits in accordance with the Rivers and Harbors Act of 1899 proceeds at its own peril and must suffer the consequences of later having to obtain those permits when the standards for their issuance are more stringent. Because these permits will be issued after the effective date of NEPA, the issuing agencies will have to file an EIS prior to issuance, as the issuance of the permits will constitute major federal action significantly affecting the environment. When they comply with NEPA, the federal agencies may take into account the present existence of the Delta and Tracy Plants. In considering operation of those facilities, however, future operational decisions must be shaped so as to minimize adverse environmental consequences, and to the extent practicable they must comply with the EIS procedure. These Section 10 permits must be obtained not to validate the past unlawful construction and operation of these two facilities, but rather to insure that future operation is in accordance with the law.

With respect to any future expansion of the Delta[63] or Tracy [64] plants, an EIS may be required. In the case of the

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[62]It may well be that after consideration of all environmental and other factors, the Corps will want to establish certain periods of the tidal cycle or year when pumping should be curtailed or should be continued at a lower rate. Another possible limitation might be the establishment of an objective test, based upon such factors as the amount of salinity in the Delta waters at various locations, which could be applied on a regular basis and which would set the operational limits.

[63]The Department of Water Resources estimates future water transmission by the State Water Project through the Delta Plant will increase to 1,723,000 acre-feet by 1980, 3,579,000 acre-feet by 1990, and 4,353,000 acre-feet by 2020. The testimony was undisputed that the present maximum pumping capacity of the Delta Plant (6300 cfs) would have to be increased in order for the State to meet contractual obligations. Mr. Teerink, Director of the Department of Water Resources, testified that the present maximum capacity was approximately ⅔ of the future contractual obligation. The present annual maximum pumping capacity of the Delta Plant is 4,599,000 acre-feet. This capacity is inconsistent with Mr. Teerink's testimony and would also seem to be

(footnote continued on following page)

Delta Plant, the state facility, if the Department of Water Resources installs the four additional pumps at the Delta Plant, as is presently planned, that agency will need to obtain a Section 10 permit prior to the commencement of installation and, consequently, the Corps of Engineers will be required to file an EIS if it determines that the expansion in capacity will have a significant effect on the environment. It will be no defense that the original project was initiated and completed prior to January 1, 1970, as any future expansion of pumping facilities and issuance of a Section 10 permit with respect thereto will constitute either future incremental major action of an ongoing project or new major federal action and may require an EIS before the agencies can proceed. See *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1282-1283 (9th Cir. 1973); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1331 (4th Cir. 1972); *Keith v. Volpe*, 352 F.Supp. 1324, 1332 (C.D.Cal.1972), *aff'd. sub nom. Keith v. California Highway Commission*, 506 F.2d 696 (9th Cir. 1974); *Morningside-Lenox Park Ass'n v. Volpe*, 334 F.Supp. 132, 144 (N.D.Ga.1971). No exemption from NEPA's requirements arises even if it were impractical to reassess the basic course of action of the original project. See *Jicarilla Apache Tribe of Indians v. Morton, supra*, 471 F.2d at 1282-1283. The

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inconsistent with any need to add four additional pumps to the Delta Plant in view of the Department's estimates of future water transmissions by the State Water Project.

[84]The rate of export pumping of Delta waters by the Tracy and Delta Plants will increase from 3,388,000 acre-feet to approximately 7,000,000 acre-feet in 1990, and approximately 7,750,000 acre-feet by 2020. The figure for 1990 assumes the completion of all related federal and state projects, including the Peripheral Canal. It is expected that by 2020, the federal government will be exporting 4,087,000 acre-feet per annum through the Tracy Plant. In order to double approximately the federal export rate, either the Tracy Plant would have to be enlarged or a supplemental pumping facility would have to be constructed, as the present maximum capacity of the Tracy Plant is only 3,400,000 acre-feet per annum if all six units are available 365 days a year.

agency required to file the EIS must still act so as to minimize any adverse environmental consequences of remaining portions of the project "to the maximum extent practicable". Where part of a project subject to the NEPA requirements has been constructed prior to the effective date of NEPA, then the cost of activity completed prior to the NEPA effective date is merely one additional factor to be weighed in applying cost-benefit analysis to determine the course of future incremental major actions subject to NEPA. Thus, in the case of a project where all major federal action is post-NEPA, an EIS is required to the *fullest extent possible*, while where some major federal action occurred pre-NEPA, an EIS is required to the *maximum extent practicable* as to major federal actions taken after January 1, 1970. *See Jicarilla Apache Tribe of Indians v. Morton, supra*, 471 F.2d at 1282-1283; *Environmental Law Fund v. Volpe*, 340 F.Supp. 1328, 1332 (N.D.Cal.1972).

In the case of the Tracy Plant, the federal facility, if the Bureau of Reclamation attempts to expand its pumping capacity, both the expansion itself and the issuance of a Section 10 permit authorizing that expansion will require an EIS.[65]

C. *Timing of the EIS*

Finally, the timing of any required EIS for the three structures considered here merits some mention. Any EIS

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[65]Here the expansion of the capacity at the Tracy Plant would constitute major federal action and the responsible federal official would be associated with the Bureau of Reclamation. The action of the Secretary of the Army (or the Corps) with respect to the issuance of the Section 10 permit would not require him to prepare an EIS since its scope would be identical to that prepared by the Bureau of Reclamation. See p. 645, *supra*. In contrast the major federal action involved with the expansion of the capacity of the Delta Plant would be the issuance of the Section 10 permit and the responsible federal official, the Secretary of the Army (or the Corps), would have to prepare an EIS.

which is required because of the issuance of Section 9 and 10 permits should be drafted and completed well in advance of the commencement of the Corps' decision-making process. See *Greene County Planning Board v. FPC, supra*, 455 F.2d at 421-422. Although we do not set forth explicit requirements with respect to the timing of the EIS by the instant agencies, they should be guided by the statement of the court in *Jones v. District of Columbia Redevelopment Land Agency, supra*, that EISes

> "were not to be merely *post hoc* environmental rationalizations of decisions already fully and finally made. Rather their purpose is to ensure 'meaningful consideration of environmental factors at all stages of agency decision making,' and to inform both the public and agencies implicated at subsequent stages of decision-making of environmental costs of the proposal." 499 F.2d at 511.

This statement also applies to the timing of any EIS that must be filed on the part of the Bureau of Reclamation due to its participation in the Peripheral Canal project. It is clear beyond cavil that an EIS would be required considerably prior to the first day of construction activity.[56] *Cf. Envi-*

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[56]At the outset of the trial, and in the initial briefs and memoranda filed with this Court, defendants asserted that the law imposed no duties presently as to the Peripheral Canal because its construction was not imminent. It was even contended that the likelihood of its being constructed at all was highly speculative. During trial, however, the parties abandoned that position, as the evidence proved that not only was the construction of the Canal imminent but that many activities certainly preparatory to the construction (if not construction itself) had been going on for some time. The Director of Water Resources, Mr. Teerink, stated that the state would build the Canal and was planning to commence construction late in 1975. He estimated completion by 1980. In order to meet that schedule, preconstruction activity (*e. g.*, right of way work, engineering studies) was presently underway.

The Department of Water Resources has officially adopted the Peripheral Canal as the Delta water facility of the State Water Project. Development and planning of the Peripheral Canal began at some point

ronmental Law Fund v. Volpe, supra, 340 F.Supp. at 1332-1333; *Morningside-Lenox Park Ass'n v. Volpe, supra*, 334 F.Supp. at 142-144.

V. CALIFORNIA ENVIRONMENTAL QUALITY ACT

Plaintiffs' sixth claim for relief alleges that the construction of the proposed Peripheral Canal, the proposed future increases in the volume of water to be pumped through the Delta and Tracy Plants, and the proposed modifications to the Delta Plant necessary to accommodate such increases will violate the California Environmental Quality Act

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prior to 1965 and proceeded up to the date of the trial. This development work included the acquisition of land as a portion of the right of way, the initial design work, and commencement of the final design work including the preparation of contract drawings and construction specifications. In this connection, the state had expended through 1973 in excess of $6,627,000 on planning and development and in excess of $2,275,000 in connection with right-of-way acquisitions and the purchase of land. Furthermore, the federal government had spent over $750,000 through March 31, 1974, on activities associated with the planning of the Canal. At present the Department of Water Resources has approximately 45-50 people involved with the design group working on the plans for the Canal. Finally, on January 18, 1968, the California Department of Public Works Division of Highways and the Department of Water Resources executed an agreement whereby the Department of Public Works would advance $2,000,000 to the Department of Water Resources so that it could acquire right of way for four segments of the Peripheral Canal sufficient to provide up to 7,000,000 cubic yards of borrow material from the canal prism. Pursuant to this agreement, contractors' bidding on the construction of Interstate 5 (I-5) would then be required to use those portions of the Peripheral Canal right of way as a mandatory borrow site for highway fill. The purpose of this agreement was to coordinate the construction of I-5 and the Peripheral Canal. Although I-5 bids were received in December of 1973, none had been accepted as of the date of the trial.

In *Friends of Earth v. Coleman*, 513 F.2d 295, 300 (9th Cir. 1975), the court held that the proposed I-5 excavations out of the proposed Peripheral Canal right of way would not constitute a commencement of the Canal project sufficiently significant to warrant formal NEPA evaluation of the Canal's environmental impact. The court did state that "an EIS will be required before any work on the canal beyond highway fill excavations can be done." *Ibid.* at 300.

(CEQA),[67] unless adequate environmental impact reports (EIR) are first prepared by the responsible state agency.[68]

Sections 21000 and 21001 of CEQA contain a declaration of California's general environmental policy. Section 21100 requires that state agencies prepare an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment.[69]

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[67]California Public Resources Code, § 21000 *et seq.*

[68]State defendants' assertion that the CEQA claim is barred by Section 21167(a) is without merit. That section provides:

"Any action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:

"(a) An action or proceeding alleging that a public agency is carrying out or has approved a project which may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project." The amendment adding the CEQA claim related back to the filing of the complaint as the CEQA claim arose out of the same transaction and involves the same defendants. Fed.R.Civ.P. 15(c).

[69]Section 21100 provides:

"All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment. Such a report shall include a detailed statement setting forth the following:

"(a) The environmental impact of the proposed action.

"(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.

"(c) Mitigation measures proposed to minimize the impact including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy.

"(d) Alternatives to the proposed action.

"(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

"(f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.

"(g) The growth-inducing impact of the proposed action."

"Project" is defined in Section 21065.[70] Section 15081 of the CEQA regulations sets forth the factors to be weighed by an agency to determine whether a particular project is such that it "may have a significant effect on the environment".[71]

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[70]Section 21065 provides:

" 'Project' means the following:

"(a) Activities directly undertaken by any public agency.

"(b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

"(c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

[71]Section 15081 provides in pertinent part:

"(a) The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An iron clad definition of significant effect is not possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area. There may be a difference of opinion on whether a particular effect should be considered adverse or beneficial, but where there is, or anticipated to be a substantial body of opinion that considers or will consider the effect to be adverse, the lead agency should prepare an EIR to explore the environmental effects involved.

"(b) In evaluating the significance of the environmental effect of a project, the lead agency shall consider both primary or direct and secondary or indirect consequences. Primary consequences are immediately related to the project (the construction of a new treatment plant may facilitate population growth in a particular area), while secondary consequences are related more to primary consequences than to the project itself (an impact upon the resource base, including land, air, water and energy use of the area in question may result from the population growth).

"(c) Some examples of consequences which may have a significant effect on the environment in connection with most projects where they occur, include a change that:

"(1) Is in conflict with environmental plans and goals that have been adopted by the community where the project is to be located;

"(2) Has a substantial and demonstrable negative aesthetic effect;

"(3) Substantially affects a rare or endangered species of animal or plant, or habitat of such a species;

(footnote continued on following page)

The California Supreme Court has noted the similarity of CEQA and NEPA and stated that interpretations of NEPA are relevant in construing similar terms in CEQA. *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049, 1058 (1972). One federal court has held that CEQA was deliberately modeled after NEPA and that therefore the same considerations govern the applicability of the two acts to the same projects. *Keith v. Volpe*, *supra*, 352 F.Supp. at 1337. Accordingly, most of the principles discussed *supra* with regard to NEPA are applicable to our consideration of the duties imposed upon defendants with respect to CEQA.

In the Agreed Pre-Trial Order the defendants stipulated that the Peripheral Canal was a project which may have a significant effect on the environment.[72] In fact, the state defendants issued a draft Environmental Impact Report on the Peripheral Canal project in August of 1974. That draft is being circulated for comments and criticism, and then a final Environmental Impact Report will be prepared. In view of the imminence of this report the Court will offer only a few observations.

At present no Environmental Impact Report is required with respect to the Delta Plant as that facility was completed

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"(4) Causes substantial interference with the movement of any resident or migratory fish or wildlife species;

"(5) Breaches any published national, state, or local standards relating to solid waste or litter control;

"(6) Results in a substantial detrimental effect on air or water quality, or on ambient noise levels for adjoining areas;

"(7) Involves the possibility of contaminating a public water supply system or adversely affecting ground water;

"(8) Could cause substantial flooding, erosion or siltation;

"(9) Could expose people or structure to major geologic hazards." 14 Cal.Admin. Code, § 15081.

[72]See Agreed Pre-Trial Order, § 3.44.

prior to the effective date of CEQA. Before expanding that facility by installing additional pumps, however, the state defendants will have to comply with CEQA.[7] There is no merit to plaintiffs' contention that increased pumping by the presently existing facility requires compliance with CEQA. Plaintiffs' reliance on *County of Inyo v. Yorty*, 32 Cal.App.3d 795, 108 Cal.Rptr. 377 (1973), is misplaced as in that case there was construction of additional pumping and extraction facilities in addition to expanded pumping at presently existing facilities. Finally, no Environmental Impact Report will be required for the Tracy Plant since that is a federal facility and thus not subject to CEQA.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law as required by Rule 52(a) Federal Rules of Civil Procedure.

It is hereby ordered that the state defendants shall obtain authorization to operate the Delta Pumping Plant in the manner prescribed in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, by the date established by

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[7]See 14 Cal.Admin.Code, § 15070, which provides in pertinent part:

"(a) A project as defined in Section 15037 (a) (1) of these Guidelines, approved prior to November 23, 1970, shall require an Environmental Impact Report or a Negative Declaration if the project may have a significant effect on the environment, and either of the following conditions exists:

"(1) A substantial portion of public funds allocated for the project have not been spent and it is still feasible to modify the project to mitigate potentially adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of 'no project' or halting the project; provided that this Section (1) shall not apply to projects which come under the jurisdiction of the National Environmental Policy Act (NEPA) and which, through regulations promulgated under NEPA, were held to be too far advanced at the time of NEPA's effective date to require an EIS in compliance with those regulations.

"(2) A public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment."

this Court at the hearing to be held on September 4, 1975, as more fully set forth below.

It is hereby further ordered that the federal defendants shall obtain authorization to operate the Tracy Pumping Plant in the manner prescribed in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, by the date established by this Court at the hearing to be held on September 4, 1975, as more fully set forth below.

It is hereby further ordered that the Secretary of the Army or his delegate shall prepare and file an Environmental Impact Statement pursuant to 42 U.S.C. § 4332 with respect to issuance of any Section 10 permits authorizing the operation of the Tracy Pumping Plant and the Delta Pumping Plant prior to the issuance of any such permits.[74]

It is hereby further ordered that all parties shall appear before this Court at 1:30 P.M. on September 4, 1975, in order to determine a date by which the state and federal defendants must obtain authorization of the operation of the Tracy and Delta Pumping Plants under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

It is hereby further ordered that with respect to the Peripheral Canal, as presently proposed, no construction work shall begin prior to the receipt of authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, and that no Section 9 or 10 permits may be issued with respect to the Peripheral Canal, as presently proposed, without the prior preparation and filing of an Environmental Impact Statement by the Secretary of the

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[74]Nothing in this order shall be construed to prohibit the federal defendants from preparing and filing one document to serve as an Environmental Impact Statement for the Tracy Pumping Plant, the Delta Pumping Plant, and the Peripheral Canal as long as any such document meets the requirements of 42 U.S.C. § 4332, and as long as legally imposed deadlines are met.

Army or his delegate pursuant to 42 U.S.C. § 4332. If the Bureau of Reclamation completes preparation of an Environmental Impact Statement with respect to the Peripheral Canal, then that report may be filed in lieu of the Environmental Impact Statement required by this order with respect to the Canal and that filing will obviate the need for such a filing by the Secretary of the Army.

It is hereby further ordered that with respect to the Peripheral Canal, as presently proposed, no construction work shall commence until the Department of Water Resources prepares and files an Environmental Impact Report pursuant to California Public Resources Code § 21100.[75]

It is hereby further ordered that plaintiffs' second, third and fifth claims are dismissed with prejudice.

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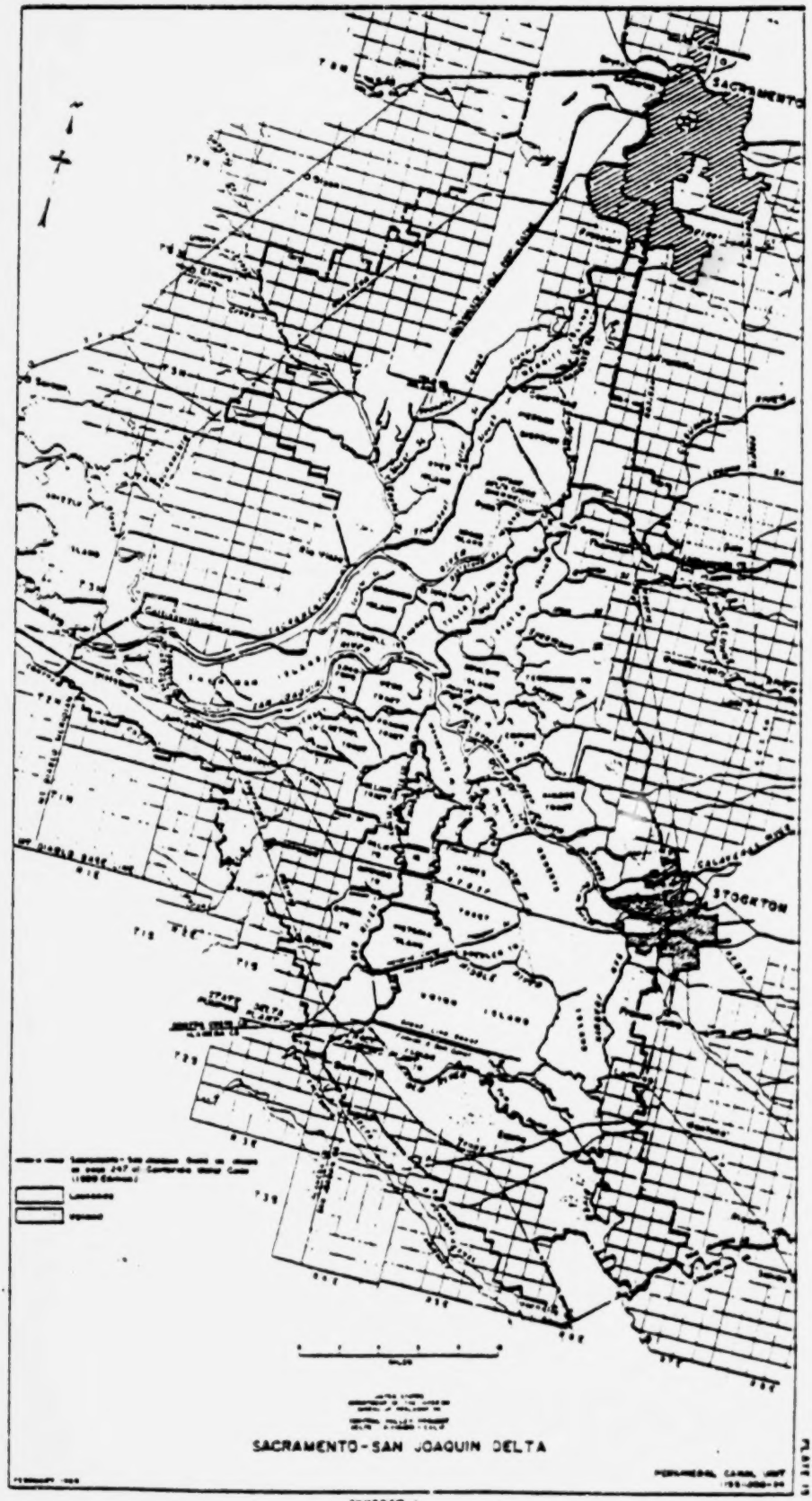
[75]Nothing in this Memorandum of Opinion shall be construed to prohibit the defendants from preparing one document to serve as both the Environmental Impact Statement and Environmental Impact Report as long as that one document meets the requirements of both 42 U.S.C. § 4332 and California Public Resources Code § 21100. Nor should anything in this Memorandum of Opinion be construed to preclude any consolidation of the work effort on the part of defendants in the preparation of the necessary Environmental Impact Statement and Environmental Impact Report to the extent that such a consolidation would result in avoidance of repetitious work by defendants.



SACRAMENTO-SAN JOAQUIN DELTA

EXHIBIT A